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Supreme Court of the United States

OCTOBER T[redacted]

No. [redacted] 114

JOSEPH HIRAM HOLT, JR., a Minor by His Next Friend, JOSEPH HIRAM HOLT, and JOSEPH HIRAM HOLT and ELWYNA HOLT,

Petitioners,

—versus—

THE RALEIGH CITY BOARD OF EDUCATION, a Body Corporate,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	5
Statement	6
Reasons for Granting the Writ	9
1. The decisions of the Court of Appeals for the Fourth Circuit and of the District Court for the Eastern District of North Carolina will in their ultimate effect lend their judicial weight in aid of retardation of desegregation of public schools, contrary to the intendment of the decision of this Court in *Brown* v. *Board of Education of Topeka, Kansas*	9
2. The decision of the Court of Appeals is in substantial diminution and abridgment of the fundamental right of counsel and the fundamental right of fair hearing	15
3. The decision of the Court of Appeals, in applying its version of North Carolina General Statute 115-178 to the instant case, effects a substantial discrimination between Negroes desirous of non-discriminatory education and all other public school students	16

PAGE

4. The decision of the Court of Appeals has rigidly, formalistically and prejudicially applied the doctrine of exhaustion of administrative remedies to a civil rights action 18

5. The Courts below should have found that Petitioners painstakingly exhausted all remedies known to them and at their disposal 19

CONCLUSION 20

APPENDICES

Appendix A—Judgment of the Court of Appeals 21

Appendix B—Opinion of the Court of Appeals 22

Appendix C—Judgment of the District Court 30

Appendix D—Opinion of the District Court 32

Appendix E—Portions of Respondent Board's Regulations Adopted May, 1957 64

Appendix F—North Carolina Pupil Enrollment Act of 1955 65

Appendix G—North Carolina Pupil Assignment Act of 1956, North Carolina General Statutes 115-176 through 179 68

Appendix H—Excerpts From Transcript of Evidence in the District Court 71

Appendix I—Petitioners' Complaint 95

Appendix J—Respondent's Answer 104

PAGE

FEDERAL CONSTITUTIONAL PROVISIONS

14th Amendment to the Federal Constitution 4, 6, 18, 19, 20

STATUTES

Federal Statutes:

Title 5, U. S. Code, Section 1005(a) 16

Title 28, U. S. Code, Section 1254(1) 2

Title 28, U. S. Code, Section 2101(c) 2

Title 42, U. S. Code, Section 1983 ..... 15, 18, 19

North Carolina Statutes:

North Carolina General Statute 115-176 ..... 5, 6, 10, 11, 12, 13, 14

North Carolina General Statute 115-177 ..... 11, 12, 13

North Carolina General Statute 115-178 ..... 4, 5, 11, 13, 14, 16, 17, 18, 19

North Carolina General Statute 115-179 ..... 5, 6, 10, 11

The North Carolina Pupil Enrollment Act of 1955 5

CASES

United States Supreme Court Cases:

Barrows et al. v. Jackson, 346 U. S. 249, 73 S. Ct. 1031, 97 L. ed. 1586 17

Brown v. Board of Education of Topeka, Shawnee County, Kan., 1954: 347 U. S. 483, 74 S. Ct. 686, 98 L. ed. 873; 1955: 349 U. S. 294, 75 S. Ct. 753, 99 L. ed. 653 ..... 13-14, 15, 18

PAGE

Chicago, Milwaukee & St. Paul Ry. Co. v. J. F. Polt, 232 U. S. 165, 34 S. Ct. 301, 58 L. ed. 554 10

Harrison v. St. Louis & San Francisco Ry. Co., 232 U. S. 318, 34 S. Ct. 333, 58 L. ed. 621 10

Heiner v. Donnan, 285 U. S. 312, 52 S. Ct. 358, 76 L. ed. 772 10

Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U. S. 278, 33 S. Ct. 312, 57 L. ed. 510 14

John Aaron et al., Petitioners v. William G. Cooper et al., 58 U. S. 1, 78 S. Ct. 1401, 3 L. ed. 2d 3 ..... 14, 15

Montana National Bank of Billings v. Yellowstone County, 276 U. S. 499, 49 S. Ct. 331, 72 L. ed. 673 18-19

Morgan v. United States, 304 U. S. 1, 58 S. Ct. 773, 82 L. ed. 1129 16

Morrison v. California, 291 U. S. 82, 54 S. Ct. 281, 78 L. ed. 664 10

National Association for Advancement of Colored People v. State of Alabama, 357 U. S. 916, 78 S. Ct. 1163, 2 L. ed. 2d 1549 10

Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 57 S. Ct. 724, 81 L. ed. 1003 15-16

Oyama v. State of California, 332 U. S. 633, 68 S. Ct. 269, 92 L. ed. 249 ..... 10, 17, 18

Pacific Tel. & Tel. Co. v. Kuykendall, 265 U. S. 196, 44 S. Ct. 553, 68 L. ed. 975 18

Railroad & Warehouse Commission of the State of Minnesota v. Duluth Street Railway Co., 273 U. S. 625, 47 S. Ct. 489, 71 L. ed. 807 18

PAGE

Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 92 L. ed. 1161; 3 A. L. R. 2d 441 ..... 10, 17

Shuttlesworth et al. v. Birmingham Board of Education of Jefferson County, Ala., 358 U. S. 101, 79 S. Ct. 221, 3 L. ed. 2d 145 18

St. Louis Iron Mountain Southern Ry. Co. v. T. J. Wayne, 224 U. S. 354, 32 S. Ct. 493, 56 L. ed. 799 10

Ed Tumey v. State of Ohio, 273 U. S. 510, 47 S. Ct. 437, 71 L. ed. 749 15

United States v. Illinois Central Railroad Co., 291 U. S. 457, 54 S. Ct. 471, 78 L. ed. 909 19

Wait v. Macy, 246 U. S. 606, 38 S. Ct. 395, 62 L. ed. 862 19

Other Federal Cases:

Andrew Iannetta Funeral Home v. State Board of Undertakers of Department of Health of Pa., 27 F. Supp. 518 15

Carson et al. v. Board of Education of McDowell County, North Carolina (C. A. 4th), 227 F. 2d 789 9

Carson et al. v. Warlick (C. A. 4th), 238 F. 2d 724 9

Chester C. Fosgate Co. v. Kirland, 19 F. Supp. 152 15

Covington v. Montgomery County Board of Education, North Carolina (C. A. 4th), 264 F. 2d 780 10

Gibson et al. v. Board of Public Instruction of Dade County, Florida et al. (C. A. 5th), 246 F. 2d 913 ..... 15, 18

Holt et al. v. Raleigh City Board of Education (C. A. 4th), 265 F. 2d 95 10

Hood v. Board of Trustees of Sumter County School District No. 2, Sumter County, South Carolina (C. A. 4th), 232 F. 2d 626 9-10

PAGE

Kelley et al. v. Board of Education, City of Nashville, Tenn. (D. C. Tenn.), 159 F. Supp. 272 ..... 15, 18

Mercantile Trust Co. v. Texas P. Ry. Co. (C. C. A. 5th), 216 F. 225 10

Michel v. Louisville & N. R. Co. (C. A. 5th), 188 F. 2d 224 16

Parker v. Lester (C. A. 9th), 227 F. 2d 708 15

Roberts v. Anderson (C. C. A. 10th), 66 F. 2d 874 16

United States v. Smith, 87 F. Supp. 293 16

WJR, The Goodwill Station v. Federal Communications Commission et al. (C. A. D. C.), 174 F. 2d 226 16

North Carolina Cases:

Alliance Company v. State Hospital at Butner, 241 N. C. 329, 85 S. E. 2d 386 11

Asbury et al. v. Town of Albemarle, 162 N. C. 247, 78 S. E. 146 11

Other State Cases:

Miner v. Industrial Commission, 202 P. 2d 557 16

People v. Silverman, 3 N. Y. 2d 200, 114 N. E. 2d 10 16

State v. City of Milwaukee, 157 Wis. 505, 147 N. W. 50 16

IN THE

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OCTOBER TERM, 1958

No. .....

JOSEPH HIRAM HOLT, JR., a Minor by His Next Friend, JOSEPH HIRAM HOLT, and JOSEPH HIRAM HOLT and ELWYNA HOLT,

Petitioners,

—versus—

THE RALEIGH CITY BOARD OF EDUCATION, a Body Corporate,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners pray that a Writ of Certiorari issue to review the Judgment and Decisions of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on March 19, 1959.

Opinion Below

The Opinion of the United States Court of Appeals for the Fourth Circuit (Record, Opinion of the Court of Appeals), is reported at 265 F. 2d 95, and —— Race Rel. Law Rep. —— and is copied in the appendices to this Petition as Appendix B. The Judgment of the United States Court of Appeals (Record, Judgment of the Court of Appeals), is copied in the appendices to this Petition as Appendix A. The Opinion of the United States District Court for the Eastern District of North Carolina (Record, Opin-

ion of the District Court), is reported at 164 F. Supp. 853 and 3 Race Rel. Law Rep. 917 and is copied in the appendices to this Petition as Appendix D. The Judgment of the United States District Court (Record, Judgment of the District Court), is copied in the appendices to this Petition as Appendix C.

Jurisdiction

The Judgment and the Opinion of the United States Court of Appeals for the Fourth Circuit are dated March 19, 1959, and were both entered on the day above mentioned. Copies of both the Judgment and Opinion of the said Court are copied in the appendices to this Petition as Appendix A and B, respectively. The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1254(1) and 2101(c).

Questions Presented

Petitioners reached the United States Court of Appeals below by a direct appeal from a Decree and Opinion of the United States District Court for the Eastern District of North Carolina, which denied Petitioners the relief which they had sought in the District Court (Record before this Court, Notice of Appeal). In their complaint in the District Court, Petitioners prayed for relief from the racial segregation and racial discrimination imposed by Respondent upon the minor Petitioner in his attendance in the public schools of the City of Raleigh, State of North Carolina (Record before this Court, Plaintiffs' Complaint). See, also, Appendix I, this Petition. For Respondent's Answer to Petitioners' Complaint in the District Court below, see Appendix J of this Petition. The District Court denied relief to Petitioners, upon the grounds that Petitioners did

not exhaust administrative remedies prior to resort to the District Court. See Record before this Court, Decree and Opinion of the District Court. See, also, Appendix C and D of this Petition. The Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit, upon Petitioners' appeal, affirmed the decision of the District Court in dismissing Petitioners' Complaint and claim for relief. See Record before this Court, Judgment and Opinion of the Court of Appeals. See, also, Appendix A and B of this Petition.

In the District Court, Petitioners offered uncontradicted evidence to the effect: (1) that the minor Petitioner was assigned to and required to attend the J. W. Ligon Junior-Senior High School, to wit, an all Negro public school, because of his race; (2) that the Respondent school board maintains a rigid and unexceptional policy of racial segregation of pupils in its public schools; (3) that Petitioners' application to Respondent school board for re-assignment upon a de-segregation basis was given a "special treatment" by Respondent school board because of (a) the race and color of Petitioners and (b) because of their assertion of the constitutional right of non-segregated public school education; (4) that the minor Petitioner was not re-assigned to the Needham-Broughton High School, to wit, an all white public school, because of his race and color; (5) that the minor Petitioner upon his request before Respondent school board for relief from a school designation and assignment which was based upon his race, was denied admittance to a public school upon a de-segregated basis because of the presumed "public interest", the presumed "best interest of the Raleigh Public Schools" and the presumed "welfare of Joseph Hiram Holt, Jr." See Record before this Court, Transcript of evidence in the District Court and Findings of Fact 23, 24 and 25 contained in the Opinion of the District Court. See, also, Appendix D and E of this Petition.

The District Court entered a Decree in which it dismissed Petitioners' Complaint and denied Petitioners' prayer for relief upon the alleged grounds that "plaintiffs failed to exhaust their administrative remedies under the North Carolina Assignment and Enrollment of Pupils Act prior to the institution of . . . suit." See Appendix C of this Petition. The United States Court of Appeals for the Fourth Circuit affirmed the Decree and Opinion of the District Court upon the same grounds upon which the District Court had placed its decision. Hence the questions presented or proposed for review by this Court are as follows:

(a) Did the District Court and Court of Appeals below err by holding that Petitioners did not exhaust administrative remedies under North Carolina law and by dismissing Petitioners' cause of action by reason of the presumed failure to exhaust administrative remedies?

(b) Did the District Court and Court of Appeals below err by holding that the doctrine of exhaustion of administration remedies applied to the instant case?

(c) Did the District Court and Court of Appeals below unconstitutionally and in violation of the 14th Amendment rights of Petitioners, apply the doctrine of exhaustion of administrative remedies to the instant action, in that, the doctrine as applied and as intended by North Carolina General Statute 115-178 is and effects a burdensome, racial, procedural discrimination principally upon Negro pupils who seek de-segregated public school education?

(d) Did the District Court and Court of Appeals below err by failing to relieve the Negro Petitioners of the racial segregation and discrimination which is spread upon the instant Record?

(e) Did the District Court and Court of Appeals below err by interpreting and construing North Carolina General Statutes 115-178, insofar as the said federal courts below have written into the state law and statutes the requirement that Petitioners must personally appear before the school board before the latter is obliged to relieve them of racial segregation and discrimination?

(f) Do the interpretation and construction of North Carolina General Statute 115-178 and other provisions of North Carolina law, as *formulated and applied by the federal courts below*, place an unconstitutional burden and penalty upon Petitioners in their effort to rid themselves of racial segregation and discrimination in the public school education of the minor Negro Petitioner?

(g) Do the interpretation and construction of North Carolina General Statute 115-178 and other provisions of North Carolina law, as *formulated and applied by the federal courts below*, unconstitutionally deny to Petitioners the right to counsel and the right to hearing or abridge Petitioners' right to counsel and right to hearing upon their claim before state administrative agencies of racial segregation and discrimination in the public school education of the minor Negro Petitioner?

Statutes Involved

North Carolina General Statute 115-176 through 115-179 is copied in the appendices to this Petition as Appendix G. These are the state statutory provisions which the courts below have construed as providing a mandatory administrative remedy. The North Carolina Pupil Enrollment Act of 1955, which was amended and replaced by North Carolina

General Statute 115-176 through 115-179, is copied in the appendices of this Petition as Appendix F. The 14th Amendment to the federal constitution is also involved in this litigation.

Statement

Petitioners commenced their action on the 29th day of August, 1957, in the United States District Court for the Eastern District of North Carolina, where they were parties-plaintiff and Respondent was party-defendant. Petitioners alleged in their complaint that Respondent Raleigh City Board of Education was adhering to a policy of maintaining its public schools on a totally racially segregated basis and that the minor Petitioner was particularly being denied the constitutional right of non-segregated public school education because of the policy, custom and practice of the Respondent board of racially segregating public school pupils. See Appendix I of this Petition for the text of Petitioners' complaint. Petitioners also alleged that they had exhausted all administrative remedies available to them, but that Respondent school board had steadfastly declined and refused to give them the relief for which they had petitioned and re-petitioned. Respondent school board, after extension of time within which to plead and after the District Court had overruled its Motion to Dismiss, filed an Answer on the 21st day of October, 1957, in which it denied any invasion of the Petitioners' constitutional rights, and in which it denied that Petitioners were entitled to maintain an action in the United States District Court or that Petitioners were entitled to receive the relief for which they prayed (Record before this Court, Defendant's Answer; Appendix J of this Petition).

The instant action was tried before Honorable Edwin M. Stanley, United States District Judge for the Middle Dis-

trict of North Carolina, in Raleigh, North Carolina, on the 14th and 15th days of July, 1958 (Record before this Court, Decree and Opinion of the District Court; Appendix D of this Petition). From a Decree in which the District Court held that Petitioners were not "entitled to the relief prayed for," Petitioners appealed to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals entered a Judgment and Opinion affirming the decision of the District Court on the 19th day of March, 1959 (Record before this Court, Judgment and Opinion of the Court of Appeals; Appendix A and B of this Petition). The instant Petition for Writ of Certiorari prays for a review of the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit, which were filed in this cause on the 19th day of March, 1959.

The facts of this case are, for the most part, succinctly stated in the District Court's Opinion, in the Findings of Fact thereof (Record before this Court, Opinion of the District Court; Appendix D of this Petition). The facts as found by the District Judge and as disclosed by evidence and stipulations of counsel, admit of the following overwhelming and mandatory conclusions: (1) the minor Petitioner is being required by Respondent school board to attend a racially segregated high school, at a distance of more than three and one-half miles from his residence and to which only Negro public school pupils are assigned and permitted to attend, while passing another high school, which is less than one mile from his home, and to which only white public school pupils are assigned by Respondent school board; (2) the minor Petitioner's application for re-assignment along non-racial lines to the high school nearest him, to wit, the Needham-Broughton Senior high school, was refused because of his race and color; (3) the Respondent school board maintains a strict policy of operating its schools upon a racial basis with no Negro and white

public school pupils attending the same school or schools, although many Negroes and white public school pupils live nearer the same school than the school to which members of one race or of the other race are assigned and allowed to attend by Respondent school board.

In addition to the foregoing facts, the Transcript of Evidence adduced before the District Court below also conclusively indicates that: (1) Petitioners' application before Respondent school board for re-assignment of the minor Petitioner upon a non-segregated basis was given a "special treatment by Respondent school board, which is not accorded to applications for re-assignment where non-segregated education is not the applicant's goal; (2) the members of Respondent school board desired to interrogate Petitioners personally upon irrelevant and impertinent matters touching their application, such as matters dealing with (a) comparisons between the high school attended by white pupils and the one attended by Negro pupils, (b) the emotional make-up of the minor Petitioner, (c) Petitioners' motivation and the origin of their motivation, for seeking non-segregated public school education, (d) Petitioners' justification, if any they had, for the request for re-assignment upon grounds other than the desire for non-segregated education, (e) the genuineness of execution of verified documents which the Petitioners had submitted to Respondent school board as to their request for de-segregated public school education for the minor Petitioner, (f) the realization on part of the Petitioners that there are no Negroes in the school to which assignment had been requested, (g) Petitioners' reasons for expecting better instruction for the minor Petitioner at the all-white high school to which re-assignment was requested, than in the all-Negro school to which Respondent had assigned the minor Petitioner; (3) Petitioners' application for re-assignment was the only application in which non-segre-

gated education was requested and which was referred to committee "for study"; and (4) Respondent felt that the time was not ripe to enter "a" colored pupil in a white school. See Record before this Court, Transcript of Evidence in the District Court. See, also, Appendix H of this Petition. The Transcript of Evidence adduced before the District Court also disclosed that three of the four members of Respondent school board, who testified, were resolute in the opinion that non-segregated education and geographical proximity were not sufficient goals alone to cause Respondent to grant Petitioners relief from a school assignment which was and is purposefully and concededly based upon race.

Reasons for Granting the Writ

The decision of the court below should be reviewed by this Court because of numerous impelling reasons, all of which are obvious from a reading of the text of the Opinion of the Court of Appeals and some of which are enumerated immediately below:

1. The decision of the United States Court of Appeals is graphic indication of the fact that the United States District Court for the Eastern District of North Carolina and the United States Court of Appeals for the Fourth Circuit are lending their judicial facilities and weight in aid of retardation of desegregation of public schools and in aid of continued segregation of pupils in public schools. In other decisions, the Court of Appeals below has weighted the constitutional rights of Negro public school pupils to racially non-discriminatory and desegregated education with the burdens of a futile, dilatory and racially discriminatory administrative remedy, *Carson et al.* v. *Board of Education of McDowell County, North Carolina* (C. A. 4th), 227 F. 2d 789; *Carson et al.* v. *Warlick* (C. A. 4th), 238 F. 2d 724; *Hood* v. *Board of Trustees of Sumter County*

School District No. 2, Sumter County, South Carolina (C. A. 4th), 232 F. 2d 626; *Covington* v. *Montgomery County Board of Education, North Carolina* (C. A. 4th), 264 F. 2d 780. In the instant case, the Court of Appeals below has, in effect, *penalized* the assertion of the constitutional rights to non-discriminatory and desegregated public school education by grafting upon so called state administrative remedies—which are ostensibly for the benefit of applicants for re-assignment—coercive, legislative investigations and inquisitions. These coercive legislative investigations and inquisitions are peculiarly, if not solely, applicable to Negro parents and students who seek desegregated public school assignments. See the Record below, Opinion of the Court of Appeals and *Holt et al.* v. *Raleigh City Board of Education* (C. A. 4th), 265 F. 2d 95. See, also *National Association for Advancement of Colored People* v. *State of Alabama*, 357 U. S. 916, 78 S. Ct. 1163, 2 L. ed. 2d 1549; *Oyama* v. *State of California*, 332 U. S. 633, 68 S. Ct. 269, 92 L. ed. 249; *Shelley* v. *Kraemer*, 334 U. S. 1, 68 S. Ct. 836, 92 L. ed. 1161, 3 A. L. R. 2d 441. Compare *Mercantile Trust Co.* v. *Texas P. Ry. Co.* (C. C. A. 5th), 216 F. 225; *Harrison* v. *St. Louis & San Francisco Ry. Co.*, 232 U. S. 318, 34 S. Ct. 333, 58 L. ed. 621; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *J. F. Polt*, 232 U. S. 165, 34 S. Ct. 301, 58 L. ed. 554; *St. Louis Iron Mountain Southern Ry. Co.* v. *T. J. Wayne*, 224 U. S. 354, 32 S. Ct. 493, 56 L. ed. 799; *Heiner* v. *Donnan*, 285 U. S. 312, 52 S. Ct. 358, 76 L. ed. 772; *Morrison* v. *California*, 291 U. S. 82, 54 S. Ct. 281, 78 L. ed. 664.

The most casual perusal and inspection of the North Carolina Pupil Assignment Plan (North Carolina General Statute 115-176 to 179), conclusively indicates that all and any legislative and coercive power which is bestowed upon the school boards relative to their interrogation of public school pupils and parents in regard to school assignments

and designations, must of necessity be exercised upon and prior to the school boards' exercise of their statutory duty to assign "each child residing within the administrative unit" to a public school (North Carolina General Statutes 115-176 to 177), rather than upon or after the invocation by the pupil and his parents of the "remedy" purportedly granted in North Carolina General Statutes 115-178 to 179. The awkwardness and ineptness of the effort of the courts below in attempting to bestow the coercive and legislative power which they have fashioned—without the beckoning of state statutory provisions or state judicial decisions—upon Respondent school board is illustrated by diversity of opinions below as to where to insert their curious creature. The District Court below presumed to graft the judicially created power, right and privilege of the Respondent school board to interrogate Petitioners, upon the very hearing which the statute ostensibly granted to Petitioners for relief from a racially discriminatory school assignment. See North Carolina General Statute 115-178. Compare *Alliance Company* v. *State Hospital at Butner*, 241 N. C. 329, 85 S. E. 2d 386; *Asbury et al.* v. *Town of Albemarle*, 162 N. C. 247, 78 S. E. 146, for the North Carolina rule pertaining to statutory construction, where it is held that "where a statute is clear, certain and intelligible, . . . words used must be given their natural or ordinary meaning." On the other hand, the Court of Appeals below presumed also to graft this presumptive power, right and privilege of the school boards upon the *ex parte* or executive consideration by the school boards of applications for re-assignment (Record before this Court, Opinions of the District and the Courts of Appeals). The Court of Appeals below held:

> "We think that in this instance the Board, when requested to transfer the child from one school to another, was clearly within its right before making its initial decision in requesting the child and his parents

to appear for interrogation, and that they on their part were clearly delinquent in refusing to attend and to furnish all relevant information."

But both courts below seem oblivious to the fact that when Petitioners requested re-assignment, Respondent school board *had already exercised its power under North Carolina General Statutes 115-176 and 177 by purposely assigning the minor to a totally segregated school under the "standards" provided in the said statute.* See the Record before this Court, District Court's Opinion, Findings of Fact number 4 and 5, and Portions of Board Regulations Adopted May 1957. See, also, Appendix D and E. The statutory provisions, of which both courts seem unaware, read as follows:

"115-176. Authority to provide for assignment and enrollment of pupils; rules and regulations.

"Each county and city board of education is hereby authorized and directed to provide for the assignment to a public school of each child residing within the administrative unit who is qualified under the laws of this state for admission to a public school. Except as otherwise provided in this article, the authority of each board of education in the matter of assignment of children to the public schools shall be full and complete, and its decision as to the assignment of any child to any school shall be final. A child residing in one administrative unit may be assigned either with or without the payment of tuition to a public school located in another administrative unit upon such terms and conditions as may be agreed in writing between the boards of education of the administrative units involved and entered upon the official records of such boards. No child shall be enrolled in or permitted to

attend any public school other than the public school to which the child has been assigned by the appropriate board of education. *In exercising the authority conferred by this section, each county and city board of education shall make assignments of pupils to public schools so as to provide for the orderly and efficient administration of the public schools, and provide for the effective instruction, health, safety, and general welfare of the pupils.* Each board of education may adopt such reasonable rules and regulations as in the opinion of the board are necessary in the administration of this article." (Emphasis added.)

"115-177. Method of giving notice in making assignments of pupils.

"In exercising the authority conferred by 115-176, each county or city board of education may, in making assignments of pupils, give individual written notice of assignment, on each pupil's report card or by written notice by any other feasible means, to the parent or guardian of each child or the person standing in loco parentis to the child, or may give notice of assignment of groups or categories of pupils by publication at least two times in some newspaper having general circulation in the administrative unit."

Only after a board of education has exercised its power of assignment under North Carolina General Statute 115-176 and 177, is the "administrative remedy," presumably contained in North Carolina General Statute 115-178, available before the same board for relief from a racially discriminatory school assignment purposefully imposed by the board of education itself.

But this Court's decisions in *Brown* v. *Board of Education of Topeka, Shawnee County, Kan.*, 1954: 347 U. S. 483, 74 S. Ct. 686, 98 L. ed. 873; 1955: 349 U. S. 294, 75

S. Ct. 753, 99 L. ed. 653; *John Aaron et al., Petitioners* v. *William G. Cooper et al.*, 58 U. S. 1, 78 S. Ct. 1401, 3 L. ed. 2d 3, *have charged the school boards with an initial duty to desegregate the public schools in their charge and to grant Negro public school pupils* desegregated education in the first instance. This duty to desegregate public schools and to grant school pupils the constitutional right to desegregated education is, in effect, an integral part of the organic law of North Carolina and abided with Respondent school board when it determined to assign and did assign the minor Petitioner to a public school pursuant to its rigid policy of segregation and presumably in compliance with the mandate of North Carolina General Statute 115-176. Compare *Home Telephone & Telegraph Co.* v. *City of Los Angeles*, 227 U. S. 278, 33 S. Ct. 312, 57 L. ed. 510. Although the language of the provisions of North Carolina General Statute 115-176 does not require the construction that the school boards have general investigatory and coercive, legislative power (including the power and prerogative of interrogation of parents and pupils prior to any school assignment), in view of the school boards' duty to observe the constitutional rights of pupils, it is a source of ever recurring wonderment as to why the federal courts below did not insert their gratuitous grant of general investigatory and coercive legislative power into North Carolina General Statute 115-176, which pertains to the initial assignment of pupils, rather than in North Carolina General Statute 115-178, which pertains to the "remedy" ostensibly granted to a pupil and his parents for relief, although, as petitioners herein contend, there is no state statutory authority for said courts making such an interpretation of the involved state statute in the first place. The decisions of the federal courts below in gratuitously arming a defaulting and delinquent school board with coercive and legislative powers and prerogatives against a

Negro public school pupil and his parents because they dared to assert the constitutional right to desegregated public school education, which the school board itself has purposefully denied to them, is contrary to the spirit and letter of the Equal Protection and Due Process Clauses of the Federal Constitution and to decisions of this Court, *Brown et al.* v. *Board of Education, supra; John Aaron et al., Petitioners* v. *William G. Cooper et al., supra; Ed Tumey* v. *State of Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. ed. 749. Compare United States Code, Title 42, Section 1983. Compare, also, the well reasoned opinions in the following cases: *Chester C. Fosgate Co.* v. *Kirland*, 19 F. Supp. 152; *Andrew Iannetta Funeral Home* v. *State Board of Undertakers of Department of Health of Pa.*, 27 F. Supp. 518; *Kelley et al.* v. *Board of Education, City of Nashville, Tenn.* (D. C. Tenn.), 159 F. Supp. 272; *Gibson et al.* v. *Board of Public Instruction of Dade County, Florida et al.* (C. A. 5th), 246 F. 2d 913. *Parker* v. *Lester* (C. A. 9th), 227 F. 2d 708.

2. The decision of the Court of Appeals is in substantial diminution and abridgment of the fundamental right of counsel and the fundamental right of fair hearing. As indicated in the preceding paragraphs, the opinion below gratuitously authorizes and commissions school boards, which have denied to Negro public school pupils the constitutional right of desegregated and non-discriminatory education, to "interrogate" and "investigate" their victims upon the very hearing which the deprived pupils and their parents invoke. Such a grant of investigatory and legislative power to a defaulting tribunal presumably commissioned to hear such a cause and its exercise during the hearing of such a cause, is totally inconsistent with constitutional notions of a fair hearing and of notice of hearing. *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 57

S. Ct. 724, 81 L. ed. 1003; *Morgan* v. *United States*, 304 U. S. 1, 58 S. Ct. 773, 82 L. ed. 1129. Again, to the extent that the courts below have held—without encouragement or beckoning of state statutory provisions or state judicial decisions—that Petitioners could not assert the right to be relieved of a purposeful, racially discriminatory school assignment and designation through counsel and in their absence, the federal courts below have diminished and abridged the fundamental right of counsel. Compare *Roberts* v. *Anderson* (C. C. A. 10th), 66 F. 2d 874; *Miner* v. *Industrial Commission*, 202 P. 2d 557; *People* v. *Silverman*, 3 N. Y. 2d 200, 114 N. E. 2d 10; *State* v. *City of Milwaukee*, 157 Wis. 505, 147 N. W. 50; *WJR, The Goodwill Station* v. *Federal Communications Commission et al.* (C. A. D. C.), 174 F. 2d 226; *Michel* v. *Louisville & N. R. Co.* (C. A. 5th), 188 F. 2d 224; *United States* v. *Smith*, 87 F. Supp. 293. Compare, also, the Federal Administrative Procedure Act, which expressly provides that in the wide assortment of administrative proceedings with which it deals, that a litigant may appear in person with counsel *or by counsel in his absence*, 5 U. S. C. 1005(a); *United States* v. *Smith, supra*. It must be recalled that North Carolina General Statute 115-178 purports *to grant to applicants for re-assignment* "a prompt and fair hearing" upon applicants' application for a hearing.

3. The decision of the Court of Appeals, in applying its version of North Carolina General Statute 115-178 to the instant case, effects a substantial discrimination between Negroes desirous of non-discriminatory education and all other public school students. In view of the rigid and unrelenting pattern of segregation existing in this State and in the City of Raleigh, North Carolina, in particular, as attested to by the Record before this Court (Record before this Court, Excerpts of Testimony from

Transcript; Appendix H of this Petition), it is obvious that the burden of North Carolina General Statute 115-178 was intended to be borne principally, if not solely, by Negro pupils who seek relief from the ubiquitous pattern of segregation in public schools. In the nature of segregation, the process of de-segregation, the smaller ratio of Negro public school pupils to white public school pupils, the advantages enjoyed by the white populace which are not enjoyed by the Negro groups, the geographical interspersion of Negro dwellings among white dwellings, and the inevitable juxta-position of the various day to day living and working processes of all people and of the entire people in an area or geographic sub-division, it is obvious, understandable and expected that the flow of desegregation in public school education is principally a one way traffic, with Negro public school pupils seeking to attend the previously lily-white public school nearer to them than a more distant, segregated public school, rather than white public school pupils seeking to attend segregated "Negro" schools. North Carolina General Statute 115-178, as written, in view of the expected flow of de-segregation in public schools and in view of the segregated pattern which this Court judicially knows, effects a substantial and purposeful discrimination upon Negro public school pupils who desire desegregated education. Compare *Shelley* v. *Kraemer, supra; Barrows, et al.* v. *Jackson*, 346 U. S. 249, 73 S. Ct. 1031, 97 L. ed. 1586; *Oyama* v. *California, supra.* When the statute is surcharged with the curious construction gratuitously applied by the federal courts below, the purposeful discrimination reaches penal proportions, *Oyama* v. *California, supra.* Again, in the District Court below, the evidence conclusively indicated that the minor Petitioner's application before the school board was subjected to "special treatment" because of its purpose, which is not accorded other applications by Respondent board of

education (Record before this Court, Transcript of Evidence in the District Court). See *Oyama* v. *California, supra.* Finally, it must be observed that the North Carolina Pupil Assignment Plan, including North Carolina General Statute 115-178, was not enacted until March 30, 1955, that is, until after this Court's 1954 decision in the *Brown* case, *supra.* Thus, it is easily demonstrated that North Carolina General Statute 115-178, as written and as applied, effects a substantial, purposeful discrimination upon Negro public school pupils who seek desegregated education, and is in violation of rights protected by the Equal Protection Clause of the 14th Amendment.

4. The decision of the Court of Appeals has rigidly, formalistically and prejudicially applied the doctrine of exhaustion of administrative remedies to a civil rights action. The doctrine has not heretofore been applied by this Court to equitable actions arising under 42 U. S. C. 1983. Compare this Court's limited decision in *Shuttlesworth, et al.* v. *Birmingham Board of Education of Jefferson County, Ala.,* 358 U. S. 101, 79 S. Ct. 221, 3 L. ed. 2d 145. Nor has it been applied by the Court of Appeals for the 5th Circuit under factual and statutory conditions similar to those upon the instant Record, *Gibson, et al.* v. *Board of Public Instruction of Dade County, Florida, et al.* (C. A. 5th), 246 F. 2d 913. See, also, *Kelley, et al.* v. *Board of Education, City of Nashville, Tenn.* (D. C. Tenn.), 159 F. Supp. 272. Again, the application of the doctrine of exhaustion of administrative remedies has been stayed by this Court, where its application is prejudicial to the vested, property rights of a litigant, *Railroad and Warehouse Commission of the State of Minnesota* v. *Duluth Street Railroad Co.,* 273 U. S. 625, 47 S. Ct. 489, 71 L. ed. 807; *Pacific Tel. & Tel. Co.* v. *Kuykendall,* 265 U. S. 196, 44 S. Ct. 553, 68 L. ed. 975. Compare *Montana National Bank of*

Billings v. *Yellowstone County*, 276 U. S. 499, 49 S. Ct. 331, 72 L. ed. 673; *Wait* v. *Macy*, 246 U. S. 606, 38 S. Ct. 395, 62 L. ed. 862; Justice Stone concurring, *United States* v. *Illinois Central Railroad Co.*, 291 U. S. 457, 54 S. Ct. 471, 78 L. ed. 909. In the instant case, the Court of Appeals and the District Court have not held that Petitioners have failed to exhaust the remedies provided by North Carolina General Statute 115-178; but rather, the said courts have held that Petitioners have not exhausted the administrative remedies provided by North Carolina General Statute 115-178 *as subsequently construed by federal courts.* Again, the doctrine as applied by the courts below is an effective denial to Petitioners of the interim right of Petitioners, which must "lapse" without redress, contrary to the plain language of 42 U. S. C. 1983. Finally, the formalistic application of the doctrine of exhaustion of administrative remedies by the courts below, to the instant action, is an open license to Respondent school board and to other boards of education to continue the confiscation of the rights of Negro public school pupils, with impunity, and to take no steps toward granting to Negro public school pupils the rights which are assured to them by the 14th Amendment to the federal Constitution.

5. Finally, as indicated in the paragraph above, the Courts below should have found that Petitioners painstakingly exhausted all remedies known to them and at their disposal. Further, the said Courts should have held that the doctrine of exhaustion of administrative remedies had no application to the instant action. Moreover, in view of the racial segregation and discrimination which is spread upon the instant Record, the said courts should have reached and decided the merits of this action in favor of Petitioners. Finally, because the serious nature and gravity of questions touching and effecting, (1) the interpretation

of the Fourteenth Amendment in school cases, (2) the applicability of the doctrine of exhaustion of administrative remedies to this and other civil rights actions of similar import, (3) the role of the federal courts in protecting the constitutional rights of Negro public school pupils to non-discriminatory education and (4) the protection of Negro public school pupils against burdensome, discriminatory, procedural devices, this is a case peculiarly appropriate for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HERMAN L. TAYLOR
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125 East Hargett Street
Raleigh, North Carolina
Counsel for Petitioners

Other Counsel:

JAMES R. WALKER, JR.
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Raleigh, North Carolina

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7758

JOSEPH HIRAM HOLT, JR., a minor, by his Next Friend, JOSEPH HIRAM HOLT and JOSEPH HIRAM HOLT and ELWYNA HOLT,

Appellants,

—VS.—

THE RALEIGH CITY BOARD OF EDUCATION, A Body Corporate,

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina

This cause came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

March 19, 1959.

MORRIS A. SOPER
United States Circuit Judge

FILED
MAR 19 1959
R. M. F. WILLIAMS, JR.
Clerk

A true copy,

Teste:

....., *Clerk,*
U. S. Court of Appeals for the

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7758

JOSEPH HIRAM HOLT, JR., a minor, by his Next Friend, JOSEPH HIRAM HOLT and JOSEPH HIRAM HOLT and ELWYNA HOLT,

Appellants,

—versus—

THE RALEIGH CITY BOARD OF EDUCATION, A Body Corporate,

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh, Edwin M. Stanley, District Judge.

(Argued January 6, 1959 Decided March 19, 1959.)

Before:

SOBELOFF, *Chief Judge,* and
SOPER and HAYNESWORTH, *Circuit Judges.*

Samuel S. Mitchell and Herman L. Taylor (Taylor and Mitchell on brief) for Appellants; Thomas F. Ellis and J. C. B. Ehringhous, Jr., for Appellee; and Malcolm B. Seawell, Attorney General of North Carolina, (Ralph Moody, Assistant Attorney General of North Carolina, on brief) for the State of North Carolina, Amicus Curiae.

SOPER, *Circuit Judge*:

This action was brought on behalf of Joseph Hiram Holt, Jr., a Negro student, fifteen years of age, residing in Raleigh, North Carolina, to secure a transfer from the Ligon High School to the Broughton High School in that city. The plaintiffs are the minor child, by his father as next friend, and his parents, and the defendant is the Raleigh City Board of Education.

Up to this time only colored students have attended the Ligon School and only white students the Broughton School. The authority to provide for the assignment and enrollment of pupils in the public schools of the State is conferred upon County and City Boards of Education by the General Statutes of North Carolina, 1957 Cumulative Supplement, Chapter 115, Article 21, §§115-176 to 115-179. Section 115-178 relating to reassignment of pupils is as follows:

"§115-178. Hearing before board upon denial of application for enrollment.—The parent or guardian of any child, or the person standing in loco parentis to any child, who is dissatisfied with the assignment made by a board of education may, within ten (10) days after notification of the assignment, or the last publication thereof, apply in writing to the board of education for the assignment of the child to a different public school. Application for reassignment shall be made on forms prescribed by the board of education pursuant to rules and regulations adopted by the board of education. If the application for reassignment is disapproved, the board of education shall give notice to the applicant by registered mail, and the applicant may within five (5) days after receipt of such notice apply to the board for a hearing, and shall be entitled to a prompt and fair hearing on the question of re-

assignment of such child to a different school. A majority of the board shall be a quorum for the purpose of holding such hearing and passing upon application for reassignment, and the decision of a majority of the members present at the hearing shall be the decision of the board. If, at the hearing, the board shall find that the child is entitled to be reassigned to such school, or if the board shall find that the reassignment of the child to such school will be for the best interests of the child, and will not interfere with the proper administration of the school or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children there enrolled, the board shall direct that the child be reassigned to and admitted to such school. The board shall render prompt decision upon the hearing, and notice of the decision shall be given to the applicant by registered mail."

On May 30, 1957, the Board of Education of the City of Raleigh issued a certificate that the minor plaintiff had satisfactorily completed the ninth grade in the Ligon School and assigned him to the same school for the ensuing year. On June 8, 1957, his parents filed with the principal of the school an application for the reassignment of the child to the Broughton School on the grounds: (1) that the Ligon School was three miles from his residence, while the Broughton School was less than a mile distant; (2) that the Broughton School offered a fuller academic and extra-curricular program, and (3) that the transfer would remove the stigma of racial segregation.

The application was referred to the Board of Education which, after some discussion, set the matter down for consideration at a regular meeting of the Board to be held on August 6, and directed its Secretary to request the child

and his parents to attend the meeting since there probably would be questions which the members of the Board would desire to ask them. Accordingly, the plaintiffs were notified of the meeting and were requested to be present; but they failed to attend. Their attorneys wrote to the board that the plaintiffs would not attend the meeting but would await the decision of the Board upon their application since, under the statute above quoted, the Board's initial action on an application for reassignment was purely ex parte. In the absence of the plaintiffs, the Board met and considered the application at the appointed time and adopted a resolution denying the application at that time "in the public interest and in the interest of Joseph Hiram Holt, Jr."

The plaintiffs were notified of this decision and within ten days thereafter, as required by the statute, made application for a hearing. In response the Board called a meeting for August 23, and notified the plaintiffs. They failed to appear in person at that time also but were represented by their attorneys, who requested the Board to rescind its denial of its application. The Board then adopted a resolution that a committee of the Board give further study to the matter and report at the next meeting of the Board. This was accordingly done. The report of the committee recommended that the prior action of the Board be not rescinded and the Board approved this recommendation.

The present suit was then instituted, in which the plaintiffs prayed the court to issue a mandatory injunction requiring the Board to admit the minor plaintiff to the Broughton School without regard to his race or color. The question came on for hearing in the District Court, in which the following facts were proved.

It was brought out in the testimony that the plaintiffs' application was the first application for the transfer of a

colored child to a white school, or vice versa; and that the Board desired the presence of the plaintiffs at the meeting of August 6th in order that it might obtain additional information about the case and, amongst other things, ascertain the basis of the plaintiffs' statement that the academic program at the Ligon School was inferior to that at the Broughton School. Members of the Board testified that they were influenced in their final decision by what they considered to be best in the interest of the child as well as in the public interest, and some of them testified that the race of the child was one of the elements that influenced their conclusion. The District Judge upheld the action of the Board and dismissed the complaint on the ground that the plaintiffs had failed to exhaust the administrative remedies provided by the statute by declining to attend the meetings of the Board when the matter was under consideration. He relied on the decisions of this Court in *Carson* v. *Board of Education of McDowell County*, 227 F. 2d 789, and *Carson* v. *Warlick*, 238 F. 2d 724, where we held, in respect to the North Carolina statute in question, as it appeared in Chapter 366 of the Session Laws of North Carolina of 1955, that if an administrative remedy is provided by state law for persons who are aggrieved by the action of school officials, the courts of the United States will not interfere until the statutory remedy has been exhausted.

It is contended by the plaintiffs that the application of this rule in the case at bar was erroneous. It is pointed out that 115-178 of the statute provides that parents who desire reassignment of a child must first make application to the Board within ten days after the assignment is made, and if their application is refused they must then apply to the Board for hearing within five days, and that there is no requirement that the parents attend the meeting of the Board at which the application is first considered nor any

requirements that the applicants attend the subsequent hearing in person. Having filed the application for reassignment and the petition for hearing within the prescribed periods, and having attended the hearing by attorneys, it is said that the plaintiffs have satisfied every requirement of the Act.

The basis of the plaintiffs' position seems to be that the statute cannot be construed to clothe the Board with investigatory powers and functions and also with the authority and duty to conduct a final hearing of a quasi-judicial character in order to make a final determination of the plaintiffs' application. Such a construction, it is argued, is not tenable since the exercise of general exploratory and investigatory powers would disable the Board from conducting the impartial hearing which the statute requires it to hold. Hence, it is said that the parents and child had no proper place at the meeting of the Board on August 6, and the Board had no power to request them to attend to submit to interrogation. In this connection, the plaintiffs refer to *Ohio Bell Telephone* v. *Public Utilities*, 301 U. S. 292.

We cannot agree with this analysis. In this day when administrative agencies and tribunals carry on the operations of government in many fields of activity, it would be an anachronism to hold that investigatory and quasi-judicial powers may not be conferred upon the same governmental agency. Indeed, such a combination of functions is established practice generally approved by the courts and subject to judicial review in case of abuse. In the operation of the public schools, such an arrangement is well nigh essential and the North Carolina statute implies that both functions shall be exercised by the boards of education. We think that in this instance the Board, when requested to transfer the child from one school to another, was clearly within its rights before making its initial decision in re-

questing the child and his parents to appear for interrogation, and that they on their part were clearly delinquent in refusing to attend and to furnish all relevant information in their possession. They were not justified in deferring their appearance until the "formal hearing" provided by the statute for a review of an adverse decision, or failing, even at that stage, to appear in person and submit to examination by members of the Board. The situation was well described in the following passage from the opinion of the District Judge:

> "* * * It must be remembered that the written application for a change of assignment complained, in addition to racial discrimination and the difference in distance from plaintiffs' home to the two schools indicated, that Broughton High School offered all the courses in which the minor plaintiff was interested and a fuller academic and extra-curricular program. Many of the Board members who testified at the trial stated that they were particularly interested in this phase of the complaint, as they had considered that Ligon High School was comparable in every respect, including the curricula offered, with the Broughton High School. It perhaps could logically be argued that these complaints were not necessary in order to entitle the minor plaintiff to reassignment, but the plaintiffs nevertheless saw fit to include these complaints in their application and it would seem that since the complaints had been made that the Board members had the right to discuss these complaints with the minor plaintiff and his parents. Further, the Board undoubtedly had the right to inquire into many other relevant and pertinent matters in order to gain sufficient information to enable it to make the findings required by statute."

We are not to be understood as approving the deliberate segregation of the races in the public schools of the city or the questioning of applicants on irrelevant matters. The regulations adopted by the Board in 1957, pursuant to 115-176 of the statute, tended to perpetuate the system, for they provided each child attending a school by assignment of the Board was assigned to the same school for the ensuing school year. Moreover certain members of the Board testified in the District Court that they were influenced, at least in part, in passing on the application for reassignment by the race of the plaintiffs. With these and other pertinent considerations in mind the District Judge might not have felt obliged to dismiss the complaint if he had reached the merits of the case, but he was restricted in the scope of his decision by the failure of the plaintiffs to do their part in giving effect to the plan of the statute. In so doing, he was acting in accordance with the rule approved by this court that persons aggrieved by the actions of the school officials of a State may not appeal for relief to the Federal courts until they have exhausted the remedies afforded them by the statutes of the State.

Affirmed.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA

RALEIGH DIVISION

Civil Action No. 1064

JOSEPH HIRAM HOLT, JR., a Minor, by His Next Friend, JOSEPH HIRAM HOLT, and JOSEPH HIRAM HOLT and ELWYNA HOLT,

Plaintiffs,

versus

THE RALEIGH CITY BOARD OF EDUCATION, A Body Corporate,

Defendant.

The above cause came on to be heard before the undersigned District Judge before the Court without a jury on July 14 and 15, 1958, and the Court having considered the evidence and the arguments of counsel for both sides and of the Attorney General of North Carolina, appearing Amicus Curiae, and having entered a memorandum Opinion including Findings of Fact and Conclusions of Law under date of August 29, 1958, and having directed that decree be entered in accordance with said Opinion and it having been concluded therein as follows:

"1. The Court has jurisdiction of the parties and the subject matter herein.

"2. The plaintiffs failed to exhaust their administrative remedies under the North Carolina Assign-

ment and Enrollment of pupils Act prior to the institution of this suit.

"3. The plaintiffs are not entitled to the relief prayed for.

"A judgment will be entered in conformity with this opinion unless the plaintiff file a written motion within ten days requesting that the case be retained on the docket for the purpose of giving them an opportunity to adequately exhaust their administrative remedies."

And it further appearing to the Court that the time having expired within which plaintiffs were allowed to file a written motion to request that the case be retained on the docket for the purpose of giving them an opportunity to adequately exhaust their administrative remedies as set forth in the concluding paragraph of said Opinion, and the Court having been further advised by letter from plaintiffs' counsel that no such motion would be filed;

Now, therefore, it is ORDERED, ADJUDGED and DECREED that this action be and the same is hereby dismissed and that the prayer of the plaintiffs for relief be and the same is hereby denied.

It is further ORDERED, ADJUDGED and DECREED that the parties hereto will bear their own costs of Court incurred herein.

Done this 17th day of September, 1958.

/s/ ELWIN M. STANLEY
United States District Judge for the Middle District of North Carolina, acting under a general designation to hold Courts in the Eastern District of North Carolina.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA

RALEIGH DIVISION

JOSEPH HIRAM HOLT, JR., a Minor, by His Next Friend, JOSEPH HIRAM HOLT, and JOSEPH HIRAM HOLT and ELWYNA HOLT,

Plaintiffs,

versus

THE RALEIGH CITY BOARD OF EDUCATION, a Body Corporate,

Defendant.

SAMUEL S. MITCHELL and HERMAN L. TAYLOR, of Raleigh, North Carolina, *for plaintiffs.*

J. C. B. EHRINGHAUS, JR. and THOMAS F. ELLIS, of Raleigh, North Carolina, *for Defendant.*

MALCOLM B. SEAWELL, Attorney General of the State of North Carolina, Ralph Moody, Assistant Attorney General of the State of North Carolina, *Amicus Curiae.*

OPINION

STANLEY, *District Judge*:

This action was commenced on August 29, 1957, by Joseph Hiram Holt, Jr., a 15 year-old Negro citizen of Raleigh, North Carolina, and his parents, Joseph Hiram Holt and Elwyna Holt, against the Raleigh City Board of Education, to have declared the rights of the minor plain-

tiff to attend the public schools of the City of Raleigh without discrimination on account of race or color, and for an injunction restraining such discrimination. Prior to the commencement of the action, the plaintiffs had sought the reassignment of the minor plaintiff from the J. W. Ligon High School to the Needham B. Broughton Senior High School.

For convenience, Joseph Hiram Holt, Jr. will hereinafter be referred to as the "minor plaintiff", his parents, Joseph Hiram Holt and Elwyna Holt, will be referred to as the "adult plaintiffs", The Raleigh City Board of Education will be referred to as the "Board of Education," the J. W. Ligon Junior-Senior High School will be referred to as the "Ligon High School", and the Needham B. Broughton Senior High School will be referred to as the "Broughton High School".

Before answering, the defendant moved to dismiss the action on the ground that the complaint failed to state a claim against the defendant upon which relief could be granted. This motion was found to be without merit and was denied by order entered on October 19, 1957. The defendant thereafter filed its answer making a general denial of most of the allegations of the complaint and alleging several specific defenses.

On January 7, 1958, the plaintiffs filed a motion for summary judgment on the ground that from the undisputed facts appearing in the pleadings, plaintiffs were entitled to a judgment against the defendant as a matter of law. This motion was denied by order entered on January 28, 1958.

On April 9, 1958, the Attorney General of North Carolina filed a motion requesting leave to present the views of the State of North Carolina in the capacity of Amicus Curiae as to the issues raised by the pleadings. This motion was granted by order dated April 22, 1958.

The case came on for trial before the court without a jury on July 14 and 15, 1958. At the opening of the trial, the court requested counsel for the plaintiffs and the defendants to confer with the view of stipulating such of the basic facts as were not in dispute. This conference proved to be fruitful and many facts were stipulated. At the conclusion of the trial, the Court took the case under advisement pending receipt of briefs from the parties, including the Attorney General of the State of North Carolina, and the presentation of oral arguments. Oral arguments were presented on August 8, 1958.

The briefs for the parties having been received, the Court, after considering the pleadings and the evidence, including the stipulations filed, and the briefs and oral arguments of the parties, including the Attorney General of the State of North Carolina, now makes and files herein its Findings of Fact and Conclusions of Law, separately stated.

Findings of Fact

1. The minor plaintiff, Joseph Hiram Holt, Jr., is a member of the Negro race, 15 years of age, a citizen and resident of the City of Raleigh, and brings this action through his duly appointed next friend, Joseph Hiram Holt. The adult plaintiffs, Joseph Hiram Holt and Elwyna Holt are also members of the Negro race, are the parents of the minor plaintiff, and are citizens and residents of the City of Raleigh. This action was duly and properly instituted in this court, summons was duly served, and the parties are properly before the Court.

2. The defendant, Board of Education, exercises such powers and duties as are conferred upon it by Chapter 115 of the General Statutes of North Carolina, and operates in the City of Raleigh two senior high schools, namely, the Ligon High School and the Broughton High school.

3. The plaintiffs reside at 1018 Oberlin Road in the City of Raleigh, which is a distance of less than one mile from the Broughton High School and a distance of more than three and one-half miles from the Ligon High School.

4. The minor plaintiff is now assigned to and enrolled in the Ligon High School, and has been so enrolled since the beginning of his ninth grade, which was the 1956-57 school term.

5. On May 30, 1957, the Board of Education delivered to the minor plaintiff a certificate of promotion and assignment, wherein it was certified that he had satisfactorily completed the course of study for the ninth grade in the Ligon High School and had been assigned to the tenth grade at the Ligon High School for the school year 1957-58.

6. On June 8, 1957, the adult plaintiffs filed with the principal of Ligon High School an application for change of pupil assignment, wherein it was requested that the minor plaintiff be assigned to the Broughton High School for the 1957-1958 school year. The application was on a form supplied by the Board of Education, and gave the following specific reasons as to why the minor plaintiff should not attend the Ligon High School to which he had been assigned, and as to why he should be reassigned to the Broughton High School:

> "13. State specific reasons why child should not attend school to which child has been assigned. (If more space necessary, attach additional sheet.)
>
> "Attendance at the J. W. Ligon School, to which pupil has been assigned, is an illegal inconvenience to both pupil and parents. Further, assignment to such school has been made purely on a racial basis with the view of fostering and continuing total segregation of

pupils in the Raleigh School System. For additional reasons, see remarks under Item 14.

"14. State specific reasons why child should be assigned to the school named by you in Paragraph 11 above. (If more space necessary, attach additional sheet.)

"J. W. Ligon High School is more than 3 miles from the residence of the pupil and attendance at the Ligon High School imposes physical and mental inconvenience upon both pupil and his parents. The school to which reassignment of the pupil is herein requested, namely, Needham Broughton High School, is only 8 blocks, more or less, or less than a mile from the residence of the pupil and is within walking distance of the pupil's home. Needham Broughton School is a senior high school which offers all of the courses which the pupil has interest in. Moreover, the pupil's attendance at the school nearest to him, namely, Needham Broughton High School, also offers to the pupil a fuller academic and extra-curricula program. Finally, the pupil's attendance at a school nearer his residence on a non-segregated basis offers to him the added advantages of removing the illegal stigma of racial segregation from his scholastic endeavor."

The application for change of pupil assignment was transmitted by the Principal of the Ligon High School to the Secretary of the Board of Education, who is also the Superintendent of the Raleigh Schools, as required by the rules and regulations of the Board of Education.

7. At its meeting on June 11, 1957, the Board of Education deferred action on all applications for change of school assignment for the 1957-1958 school year, including the application of the plaintiffs, until the next meeting of the

Board. The following is an excerpt from the minutes of said meeting of the Board of Education:

> "A number of applications for a change of school assignment for 1957-1958 were presented to the Board by the Secretary. Actions on these applications were deferred until the next meeting.
>
> "The Secretary gave the Board an application for change of assignment of Joseph H. Holt, Jr., from J. W. Ligon Junior-Senior High School to Needham Broughton High School. Upon motion by Mr. Martin, seconded by Mr. Powell, action on this application was deferred until the next meeting of the full Board."

8. On June 12, 1957, Mr. Samuel S. Mitchell, of counsel for the plaintiffs, wrote a letter to the members of the Board of Education expressing dissatisfaction over the fact that the Board had not considered the application of the plaintiffs for reassignment at its June 11 meeting, particularly in view of the fact that other business had been transacted, including the reassignment of some sixty-five other students, and requesting that the application of the plaintiffs be immediately brought before the Board for consideration.

9. On June 13, 1957, Mr. Jesse O. Sanderson, Superintendent of the Raleigh Public Schools and Secretary of the Board of Education, wrote Mr. Mitchell that he was in error in his assumption that the Board of Education at its June 11 meeting had considered the application of other students for reassignment, and stated that the Board deferred action on all applications for change of school assignment, including those of both white and Negro students, for the 1957-1958 school year.

10. At its meeting on July 9, 1957, the application for change of school assignment of the minor plaintiff was

considered by the Board of Education. After some discussion, resolutions were adopted listing the application of the minor plaintiff as the first item of business on the agenda at its regular meeting on August 6, and requesting that the minor plaintiff and his parents be present at said meeting. The following is an excerpt from the minutes of said meeting:

> "The application for change of school assignment of Joseph Hiram Holt, Jr., from J. W. Ligon School to Needham Broughton High School was considered by the Board. After a discussion of this application, Mr. Carnage moved that the application of Joseph Hiram Holt, Jr., be listed as the first item of business on the agenda for the regular meeting on August 6 and that the Board act on the application at this time. The motion was seconded by Mr. Fisher and unanimously passed.
>
> "A motion by Mr. York, seconded by Mr. Powell, that Joseph Hiram Holt, Jr., and his parents be requested to be present at the August 6 meeting was unanimously passed."

11. On July 15, 1957, Mr. Jesse O. Sanderson, pursuant to the action taken by the Board of Education at its meeting on July 9, wrote the following letter to Mr. and Mrs. Joseph H. Holt, the adult plaintiffs, at 1018 Oberlin Road, Raleigh, North Carolina:

> "Your application for a change of the school assignment for 1957-1958 of your son Joseph Hiram Holt, Jr., will be considered by the Board of Education on Tuesday, August 6, at about 1:00 p. m. The Board has authorized the secretary to request you and your son to be present at the time your application is being discussed. There will probably be questions about your

application for a change of assignment that various Board members may wish to ask you and your son."

12. On July 17, 1957, Mr. Samuel S. Mitchell, of counsel for the plaintiffs, wrote the Board of Education the following letter, which was in response to the letter written by Mr. Sanderson on July 15, 1957, to the adult plaintiffs:

"As you no doubt know, we represent the parents of Joseph H. Holt, Jr., who have filed an application for the reassignment of said child to Needham Broughton High School for the 1957-58 school term. We note that you plan to take action on this application at your August 6th meeting. We also note that there has been discussion as to whether the parents of young Holt will attend this August meeting.

"This is written to inform you that we are advising our clients, the Holts, not to attend this meeting and to await the decision of your Board upon their application by the registered mail which is required by North Carolina General Statutes 115-178, Section 3. As we read the Pupil Assignment Act, the Board's initial action on an application for reassignment is purely ex parte. We wish to assure you that the Holts will take our advice in this matter and that they will not attend your August 6th meeting." (Emphasis supplied.)

13. At a meeting held on August 6, 1957, the Board of Education considered the application of the minor plaintiff for a change of school assignment for the 1957-1958 school year from the Ligon High School to the Broughton High School, and denied the application. The following is an excerpt from the minutes of said meeting:

"The application for a change of school assignment for 1957-58 for Joseph Hiram Holt, Jr., from J. W.

Ligon Junior-Senior High School to Needham Broughton High School was next considered by the Board. Mr. York moved that in public interest of Joseph Hiram Holt, Jr., that this application for a change of Joseph Hiram Holt, Jr., that this application for a change of assignment be denied at this time. The motion was seconded by Mr. Fisher. After considerable discussion a vote on the motion was called for by the chairman. Five members voted 'aye' and one member voted 'no.' The chairman declared the motion carried five to one."

14. Neither of the plaintiffs attended the meeting of the Board of Education held on August 6, 1957, when the application for change of school assignment was considered.

15. On August 7, 1957, Mr. Sanderson wrote the adult plaintiffs as follows:

"The application for change of assignment of your son, Joseph H. Holt, Jr., from J. W. Ligon Junior-Senior High School to Needham Broughton High School during the 1957-58 school year was considered by the Board of Education in a meeting on Tuesday, August 6. The Board's decision was that your application for reassignment, in the public interest and in the interest of your son, be denied at this time."

16. On August 9, 1957, the adult plaintiffs sent to the Board of Education the following communication, duly verified, expressing dissatisfaction with the motion taken by the Board on August 6, 1957, in denying the application of the minor plaintiff for a change of school assignment, and making application for a hearing:

"THE UNDERSIGNED parents of Joseph Hiram Holt, Jr., who seasonably made application for the change of

the school assignment of said Joseph Hiram Holt, Jr., from the J. W. Ligon Junior-Senior High School to the Needham Broughton High School, are dissatisfied with and except to the ruling of the Board upon such application, which ruling was made Tuesday, August 6, 1957, and Notice of which was received by the undersigned on the 8th day of August, 1957, the said ruling denying application made by and for the said Joseph Hiram Holt, Jr., for change of school assignment from Ligon Junior-Senior High School to Needham Broughton High School. THE UNDERSIGNED RESPECTFULLY HEREBY MAKE APPLICATION TO THE BOARD OF EDUCATION OF THE CITY OF RALEIGH FOR A HEARING IN THIS MATTER BEFORE SAID BOARD AS PROVIDED IN NORTH CAROLINA GENERAL STATUTES 115-178, SUB-SECTION 3, AND REQUEST THE SAID HEARING BE SET IMMEDIATELY, TIME BEING OF THE ESSENCE." (Emphasis supplied.)

17. On August 12, 1957, Mr. Sanderson wrote the following letter to the adult plaintiffs advising that a meeting of the Board of Education had been called for Friday, August 23, for a hearing on the ruling of the Board denying the application of the minor plaintiff:

"A called meeting of the Board of Education has been scheduled for Friday, August 23, at 12:30 p. m. for a hearing on the ruling of the Board denying your application for change of assignment for your son Joseph Hiram Holt, Jr.

"Since the Board meetings are luncheon meetings, the hearing will likely begin at 1:00 p. m. on Friday, August 23."

18. The Board of Education met at the scheduled time on August 23, 1957, for the purpose of conducting the requested meeting. Neither of the plaintiffs appeared at the hearing but were represented by Mr. Herman L. Taylor,

one of plaintiffs' attorneys. When the hearing on the application was reached, Mr. Taylor filed with the Board a verified petition and verified power of attorney, both signed by the adult plaintiffs. The petition reviewed the previous proceedings before the Board, acknowledged receipt of the letter of August 12 granting the hearing, and requested the Board to reconsider its August 6, 1957, decision and approve the change of pupil assignment as originally requested in the application of June 8, 1957. The power of attorney appointed Herman L. Taylor and Samuel S. Mitchell, of the law firm of Taylor and Mitchell, the true and lawful attorneys of the adult plaintiffs, to appear and represent them before the Board of Education in connection with the application on behalf of the minor plaintiff for change of pupil assignment.

19. The following are excerpts from the minutes of the meeting of the Board of Education held on August 23, 1957, showing the action taken by the Board on the application of the adult plaintiffs for a hearing:

> "The secretary presented to the Board the attached request for a hearing from Joseph Hiram Holt and his wife Elwyna Haywood Holt. The chairman then invited anyone who wished to speak in behalf of the application for a change in the assignment of Joseph Hiram Holt, Jr., to do so. H. L. Taylor, attorney, at this point gave to the Board the attached instrument of Power of Attorney and the attached Petition. Attorney Taylor requested the Board to rescind its action of Tuesday, August 6, 1957, denying application made by Joseph Hiram Holt, Jr., for a change in school assignment from J. W. Ligon Junior Senior High School to Needham Broughton High School.
>
> "Mr. York then moved that the action taken on Tuesday, August 6, 1957, denying the application of Joseph

Hiram Holt, Jr., for a change of school assignment stand. The motion was seconded by Mr. Fisher. A substitute motion was made by Mr. Martin that further study of the application of Joseph Hiram Holt, Jr., be made by the committee appointed on August 16, and that the committee report to the Board at the next meeting. The substitute motion was seconded by Mr. Carnage. After a brief discussion, the chairman called for a vote on the substitute motion. The substitute motion was passed. The passage of this substitute motion concluded the hearing of the request of Joseph Hiram Holt, Jr., for a change in school assignment for the 1957-58 school year."

20. The chairman gave everyone present at the meeting of the Board on August 23 an opportunity to speak for or in opposition to the petition presented on behalf of the minor plaintiff. The only one who took advantage of the opportunity was Rev. S. F. Daley, who read a letter protesting the previous action of the Board.

21. At its meeting held on August 28, 1957, the Board of Education received the report of the committee appointed pursuant to the resolution adopted on August 23, 1957, and adopted a resolution declining to rescind the previous action of the Board on the request of the plaintiff for a change in assignment. The following is an excerpt from the minutes of the meeting of the Board taking this action:

"Mr. Martin, chairman of the committee that was assigned to make further study of the Joseph Hiram Holt, Jr., application for change of school assignment from J. W. Ligon Junior-Senior High School to Needham Broughton High School during the 1957-58 school year was requested by the chairman to make a committee report and recommendation. Mr. Martin re-

ported that the committee, including Mr. York and Mr. Carnage, met in the afternoon on August 27, 1957, with the superintendent in attendance. Mr. Martin stated that the Joseph Hiram Holt, Jr., application was discussed and considered by the committee and the committee recommended that in the interest of the public, and in the best interest of the Raleigh Public Schools and for the welfare of Joseph Hiram Holt, Jr., that the previous action of the Board on this request for a change of assignment not be rescinded at this time. Mr. Martin noted that Mr. Carnage voted against the committee report.

"Mr. Martin moved that the report of the committee be accepted. The motion was seconded by Mr. York and passed. Mr. Martin, Mr. York, Mr. Stough, Mr. Fisher and Mr. Powell voted for the motion. Mr. Carnage voted against the motion."

22. In May, 1957, the Board of Education adopted certain rules and regulations governing the assignment and enrollment of pupils in the Raleign administrative unit, and the procedure for conducting hearings on applications for reassignment to specific schools. Generally, these rules and regulations provided (a) that prior to the close of each current year the Board shall assign to a school for the following year each child theretofore attending a school by assignment from the Board, (b) that the parent or guardian of any child who is dissatified with the assignment made by the Board, may, within 30 days after notification of assignment, apply in writing to the Board for reassignment of the child to a different school, (c) that such application shall be made on forms to be approved by the Board and delivered to the principal of the school to which the child was last assigned, (d) that such application shall state in detail the specific reasons why the parents are dissatisfied with the school to which the child has been

assigned and the specific reason why the applicants think the child should be assigned to the school to which they seek his admission, (e) that the application must be verified by both parents, (f) that the application, if in proper form, shall be considered at the earliest practicable date by the Board, and the parents shall be notified of the time and place of the hearing, and have the right to be heard and present witnesses in support of the application, (g) that in addition to receiving such evidence as might be presented on behalf of the parents the Board may receive evidence in opposition to the granting of the application or may conduct investigations on any objections offered, or on its own motion, including examination of the child involved, so as to make a proper decision on the application, and (h) that a decision on the application would be rendered by the Board as early as practicable and that the parents would be notified thereof in writing.

23. Prior to the 1957-1958 school year the Board of Education had followed a fixed policy of assigning all white children living within the Raleign administrative unit to the Broughton High School and all Negro children living within said administrative unit to the Ligon High school.

24. At a meeting held on May 14, 1957, the Board of Education adopted a resolution providing that each child then attending a school by assignment from the Board be assigned to the same school for the year 1957-1958.

25. Prior to the 1957-1958 school year, no Negro student had ever attended the Broughton High School and no white student had ever attended the Ligon High School.

26. The minor plaintiff satisfactorily completed the course of study prescribed for the ninth grade in the Ligon High School during the 1956-1957 school year and satis-

factorily completed the course of study prescribed for the tenth grade in the Ligon High School during the 1957-1958 school year. He has been assigned to the eleventh grade in the Ligon High School for the 1958-59 school year.

Discussion

Based on the foregoing facts, the principal questions presented to the Court for determination are (1) whether the plaintiffs have exhausted their administrative remedies under the North Carolina Assignment and Enrollment of Pupils Act, and (2) whether the minor plaintiff was refused reassignment to the Broughton High School on account of his race. In view of the conclusions reached with respect to the first question, little discussion of the second question will be required.

I

Whether the Plaintiffs Have Exhausted Their Administrative Remedies Under the North Carolina Assignment and Enrollment of Pupils Act

Whatever might be the law in other circuits, and in other states in this circuit, it is abundantly clear that in North Carolina plaintiffs in suits of this type must exhaust their administrative remedies under the state law relating to the assignment and enrollment of pupils in public schools before the Courts of the United States will grant injunctive relief. This is plainly the holding of the Court of Appeals for this circuit in the Carson cases.

In Carson v. Board of Education of McDowell County, Cir. r, 227 F. 2d 789 (1955), the Court of Appeals for this circuit, in referring to the administrative remedies provided for under the North Carolina statutes, had this to say:

"An administrative remedy is thus provided by state law for persons who feel that they have not been assigned to the schools that they are entitled to attend; and it is well settled that the courts of the United States will not grant injunctive relief until administrative remedies have been exhausted. Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 51, 58 S. Ct. 459, 82 L. Ed. 638; Natural Gas Pipeline Co. of America v. Slattery, 302 U. S. 300, 310, 311, 58 S. Ct. 199, 82 L. Ed. 276; Hegeman Farms Corp. v. Baldwin, 293 U. S. 163, 172, 55 S. Ct. 7, 79 L. Ed. 259; United States v. Illinois Central R. Co., 291 U. S. 457, 463, 54 S. Ct. 471, 78 L. Ed. 909; P. F. Petersen Baking Co. v. Vryan, 290 U. S. 570, 575, 54 S. Ct. 277, 78 L. Ed. 505; Porter v. Investors' Syndicate, 286 U. S. 461, 52 S. Ct. 617, 76 L. Ed. 1226; Matthews v. Rodgers, 284 U. S. 521, 525-526, 52 S. Ct. 217, 76 L. Ed. 447; Prentis v. Atlantic Coast Line R. Co., 211 U. S. 210, 29 S. Ct. 67, 53 L. Ed. 150.

"This rule is especially applicable to a case such as this, where injunction is asked against state or county officers with respect to the control of schools maintained and supported by the state. The federal courts manifestly cannot operate the schools. All that they have the power to do in the premises is to enjoin violation of constitutional rights in the operation of schools by state authorities. Where the state law provides adequate administrative procedure for the protection of such rights, the federal courts manifestly should not interfere with the operation of the schools until such administrative procedure has been exhausted and the intervention of the federal courts is shown to be necessary. As said by Mr. Justice Stone in Matthews v. Rodgers, supra (284 U. S. 525): 'The scrupulous regard for the rightful independence of state govern-

ments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.' Interference by injunction with the schools of a state is as grave a matter as interfering with its fiscal operations and should not be resorted to 'where the asserted federal right may be preserved without it.'"

The same questions were again discussed in Carson v. Warlick, Cir. 4, 238 F. 2d 724, certiorari denied 353 U. S. 910, 77 S. Ct. 665, 1 L. Ed. 2d 664. In this case, the late Chief Judge Parker, speaking for the court stated:

"We think it clear that applicants are not entitled to the writ of mandamus which they ask, for the reason that it nowhere appears that they have exhausted their administrative remedies under the North Carolina Pupil Enrollment Act, and are not entitled to the relief which they seek in the court below until these administrative remedies have been exhausted. See 227 F. 2d at page 790.

* * * * *

"It is argued that the Pupil Enrollment Act is unconstitutional; but we cannot hold that that statute is unconstitutional upon its face and the question as to whether it has been unconstitutionally applied is not before us, as the administrative remedy which provides has not been invoked. It is argued that it is unconstitutional on its face in that it vests discretion in an administrative body without prescribing adequate standards for the exercise of the discretion. The standards are set forth in the second section of that act. G. S. 115-177, and require the enrollment to be 'so as to provide for the orderly and efficient administration

of such public schools, the effective instruction of the pupils therein enrolled, and the health, safety, and general welfare of such pupils.' Surely the standards thus prescribed are not on their face insufficient to sustain the exercise of the administrative power conferred. As said in OppCotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 312 U. S. 126, 145, 657, 61 S. Ct. 524, 533, 85 L. Ed. 624: 'The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct.' Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective.' The authority given the boards 'is of a fact-finding and administrative nature, and hence is lawfully conferred.' Sproles v. Binford, 286 U. S. 374, 397, 52 S. Ct. 581, 588, 76 L. Ed. 1167. See also Doublas v. Noble, 261 U. S. 165, 169-170, 43 S. Ct. 303, 67 L. Ed. 590; Hall v. Geiger-Jones Co., 242 U. S. 539, 553-554, 37 S. Ct. 217, 61 L. Ed. 480; Mutual Film Corp. of Missouri v. Hodges, 236 U. S. 248, 35 S. Ct. 393, 59 L. Ed. 561; Mutual Film Corp. v. Industrial Commission of Ohio, 236 U. S. 230, 245-246, 35 S. Ct. 387, 59 L. Ed. 552; Red 'C' Oil Mfg. Co. v. Board of Agriculture of North Carolina, 222 U. S. 380, 394, 32 S. Ct. 152, 56 L. Ed. 240.

"Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the Schools and the school boards having the schools in charge. It is to be presumed that these will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on ac-

count of race which the Constitution forbids. Not until they have been applied to and have failed to give relief should the courts be asked to interfere in school administration. As said by the Supreme Court in Brown v. Board of Education, 349 U. S. 294, 299, 75 S. Ct. 753, 756, 99 L. Ed. 1083:

"'School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.'

* * * * *

"Applicants here are not entitled to relief because of failure to exhaust what are unquestionably administrative remedies before the board.

* * * * *

"It is the state school authorities who must pass in the first instance on their right to be admitted to any particular school and the Supreme Court of North Carolina has ruled that in the performance of this duty the school board must pass upon individual applications made individually to the board. The federal courts should not condone dilatory tactics or evasion on the part of state officials in according to citizens of the United States their rights under the Constitution, whether with respect to school attendance or any other matter; but it is for the state to prescribe the administrative procedure to be followed so long as this does not violate constitutional requirements, and we see no such violation in the procedure here required."

Since there can be no question but that the plaintiffs here were required to exhaust their administrative remedies provided for under the State statutes, it becomes necessary

to weigh the facts in this case against these statutory requirements.

Sections 115-176 through 115-179, General Statutes of North Carolina, provide for the administrative procedure to be followed in the enrollment and assignment of pupils in the public schools of North Carolina. Sec. 115-176 authorizes city and county boards of education to provide for the assignment to a public school of each child residing within the administrative unit, and authorizes each board of education to adopt reasonable rules and regulations relating to the assignment of pupils. Sec. 115-177 relates to the methods of giving notice of assignment. No contention has been made in this case that the board of education was without authority to enroll the minor plaintiff or that proper notice of his assignment was not received. Sec. 115-178 prescribes the method for applying for reassignment, and a hearing before the board, in cases where the parents or guardian of any child are dissatisfied with the initial assignment made by the board of education. Sec. 115-179 relates to appeals to the state court from decisions of the board.

In view of the importance of Sec. 115-178, relating to applications for reassignments and hearing, same is quoted in full.

> "Sec. 115-178. Application for reassignment: notice of disapproval; hearing before board.—The parent or guardian of any child, or the person standing in loco parentis to any child, who is dissatisfied with the assignment made by a board of education may, within ten (10) days after notification of the assignment, or the last publication thereof, apply in writing to the board of education for the reassignment of the child to a different public school. Application for reassignment shall be made on forms prescribed by the board,

of education pursuant to rules and regulations adopted by the board of education. If the application for reassignment is disapproved, the board of education shall give notice to the applicant by registered mail, and the applicant may within five (5) days after receipt of such notice apply to the board for a hearing, and shall be entitled to a prompt and fair hearing on the question of reassignment of such child to a different school. A majority of the board shall be a quorum for the purpose of holding such hearing and passing upon application for reassignment, and the decision of a majority of the members present at the hearing shall be the decision of the board. If, at the hearing, the board shall find that the child is entitled to be reassigned to such school, or if the board shall find that the reassignment of the child to such school will be for the interest of the child, and will not interfere with the proper administration of the school, or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children there enrolled, the board shall direct that the child be reassigned to and admitted to such school. The board shall render prompt decision upon the hearing, and notice of the decision shall be given to the applicant by registered mail. (1955, c. 366, s. 3; 1956, Ex. Sess., c. 7, s. 3)". (Emphasis supplied.)

Generally, under the provisions of Sec. 115-178, two steps seem to be required before a person dissatisfied with his assignment can be said to have exhausted his administrative remedies so as to permit him to apply to the federal courts for injunctive relief. The first step requires the filing of a written application with the board of education within 10 days after notification of the assignment. Such applications must be made on forms prescribed by the

board of education and pursuant to rules and regulations adopted by the board. If the application for reassignment is disapproved, the board of education is required to give notice thereof to the applicant by registered mail. The second step requires the applicant, within five days after receipt of notice of disapproval of his written application, to apply to the board for a hearing. Provision is made for a prompt and fair hearing on the question of assignment of the child to a different school.

There seems to be little question but that the plaintiffs have complied with the first step by timely filing a written application for reassignment on a form prescribed and furnished by the board, notwithstanding the contention of the defendant that the plaintiffs failed to comply with the first step when they refused to appear before the board for a hearing on their written application. In this regard, it should be borne in mind that the rules and regulations adopted by the board of education pursuant to Sec. 115-176 provides for notification to the parents of the child as to the time and place the written application will be heard, and also provides for receiving evidence and conducting the hearing in connection with the written application. The rules and regulations are silent in regard to the statutory provisions for a hearing in the event the written application for reassignment is disapproved. The question then arises as to whether or not the plaintiffs were within their rights in refusing to attend the August 6, 1957, meeting of the Board of Education after having been requested to do so. By letter dated July 17, 1957, plaintiffs' counsel advised the Board that plaintiffs would not attend this meeting for the reason that the Board's initial action on the application for reassignment was "purely ex parte". It would appear that plaintiffs' counsel was correct in this interpretation of the statute. If the General Assembly in the enactment of Sec. 115-178 contemplated a hearing in

connection with the written application required under the first step referred to above, there would have been no necessity for the hearing provided for under the second step. Conceding that the plaintiffs were technically within their rights in refusing to attend the August 6 meeting for a hearing in connection with their written application, the question arises as to whether they should be excused for their failure to appear in person at the August 23, 1957, meeting, pursuant to the written request for a hearing filed with the Board of Education on August 7, 1957. The undisputed facts show that after the hearing had been requested by the adult plaintiffs, and the request had been granted by the Board of Education, and proper notice had been given of the time and place of the hearing, only plaintiffs' counsel appeared at the hearing with a petition and power of attorney. The petition only reviewed the previous action of the Board and again requested that the change of assignment be made as originally requested. It is true that the Board did not make a second request for the personal appearance of the plaintiffs, but I think it is logical to assume that the Board was justified in feeling that such a request would be futile in view of the fact that the first request for a personal appearance had been declined.

It would then seem that the question of exhaustion of administrative remedies narrows itself down to the point of whether or not the plaintiffs adequately complied with the second step required under Sec. 115-178, when they failed to personally appear at the hearing on August 23. I conclude that they did not. Most of the Board members who testified at the trial stated that they in good faith desired to interview the minor plaintiff and his parents. It must be remembered that the written application for a change of assignment complained, in addition to racial discrimination and the difference in distance from plaintiffs' home to the two schools involved, that Broughton High

School offered all the courses in which the minor plaintiff was interested and a fuller academic and extra-curricula program. Many of the Board members who testified at the trial stated that they were particularly interested in this phase of the complaint, as they had considered that Ligon High School was comparable in every respect, including the curricula offered, with the Broughton High School. It perhaps could logically be argued that these complaints were not necessary in order to entitle the minor plaintiff to reassignment, but the plaintiffs nevertheless saw fit to include these complaints in their application and it would seem that since the complaints had been made that the Board members had the right to discuss these complaints with the minor plaintiff and his parents. Further, the Board undoubtedly had the right to inquire into many other relevant and pertinent matters in order to gain sufficient information to enable it to make the findings required by statute.

It is clear that the state legislature contemplated something more than appearance by an attorney, and that plaintiffs' counsel recognized this fact when they wrote the Board of Education on July 17 that "as we read the Pupil Assignment Act, the Board's initial action on an application for reassignment is purely ex parte." It can reasonably be inferred that plaintiffs' counsel must have attached some significance to the second step which provides for a hearing. In other words, the plaintiffs elected to follow the statute rather than the rules and regulations promulgated by the Board, and having so elected they are required to substantially comply with its provisions. The plaintiffs cannot ignore the rules and regulations of the Board in regard to a hearing on the ground that they are not in harmony with the statute and, at the same time, ignore the statutory provisions.

Counsel for the plaintiffs take two positions in their brief in regard to the failure of the plaintiffs to personally

appear for the hearing. Their first contention is that it is for the plaintiffs to determine the type of hearing which they desire and its scope. This position is completely untenable since the board, in order to meet its fact finding responsibility under the statute, is entitled to have the plaintiffs show, through a personal appearance, their reasons for seeking reassignment and to answer relevant questions. The statute, Sec. 115-178, makes the finding that . . . "the reassignment of the child to such school will be for the best interests of the child, and will not interfere with the proper administration of the school, nor with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children there enrolled . . . " Such findings must be based on some type of evidence, and certainly the Board is entitled to interrogate the applicants for reassignment in regard to these and other relevant factors. This is not to infer, however, that the Board is permitted to consider the race of the applicant in making these findings, since it is well settled that school children have the right "to be admitted to the schools of North Carolina without discrimination on the ground of race." Carson v. Warlick, supra.

Another contention made by the plaintiffs in regard to their refusal to appear before the Board is that, because of the alleged "custom, practice and usage" which the defendants pursued in operating its schools on a racially segregated basis, and its commitment to a continuation of those policies as shown in the rules and regulations adopted in May, 1957, the plaintiffs were not required to pursue their administrative remedies beyond the filing of the written application. This position is likewise completely without merit. As pointed out above, the Court of Appeals for this circuit in Carson v. Board of Education, supra, and Carson v. Warlick, supra, has held that an exhaustion of administrative remedies under the North Carolina pupil

assignment law is a prerequisite to asking the federal courts for relief.

While, as it is stated in Carson v. Warlick, the " . . . courts should not condone dilatory tactics or evasion on the part of state officials in according to citizens of the United States their rights under the Constitution, . . . "/it is equally true that citizens, before seeking relief in the federal courts are likewise required to substantially comply with the standards of conduct prescribed for them. Mutual good faith on the part of the state and its citizens is required.

It might well be observed in passing that while school boards, in meeting their responsibility and observing the standards prescribed by the legislature, may prescribe reasonable rules and regulations for filing applications and conducting hearings under Sec. 115-178, such rules and regulations must be reasonable and must not be inconsistent with the Assignment and Enrollment of Pupils Act. Rules and regulations which are unreasonable, or which are inconsistent with this act, or which can reasonably be said to have been designed to create confusion rather than enlightment or which prescribe unreal or technical standards, should be disregarded by the court. Due consideration has been given to the fact that the Board of Education in this case adopted rules and regulations that combined both administrative steps into one, and in this regard do not conform to the provisions of Sec. 115-178. However, this becomes insignificant in this case in light of the fact that the plaintiffs recognized that the Board had exceeded its authority in combining both administrative steps into one and refused to appear at the proposed hearing based on the written application. Having elected to follow the statute rather than the rules and regulations promulgated by the Board, they were bound, in good faith, to comply with the statute and make a personal appearance at the hearing which was requested by them and granted by the Board.

The statute under which the plaintiffs elected to pursue their administrative remedies contains every requirement of a formal hearing of a quasi judicial character, with evidence produced and findings made.

The term "hearing" has been defined in numerous cases. Frequently, as in other matters, the construction depends on the type of hearing contemplated. For example, hearings for the purpose of determining motions based on legal conclusions to be drawn from admitted facts do not generally require the presence of the parties, but most of the authorities seem to hold that where fact are to be determined on the basis of hearings before administrative agencies, the personal appearance of witnesses is necessary. In Morgan v. United States, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288 (1936), the Supreme Court of the United States, in considering a rate order made by the Secretary of Agriculture under the Packers and Stockyards Act of 1921, stated:

> "There must be full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. United States v. Abilene & S. R. Co., supra. Facts and circumstances which ought to be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order * * *
>
> "A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a quasi judicial character. The requirement of a 'full hearing' has

obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument * * *

"* * * But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred."

In Feeney v. Willard, 129 F. Supp. 414, 417 (D. C. S. D. N. Y., 1955), a hearing is defined as follows:

". . . 'Hearing' is a term of art in administrative proceedings, and if it is to have any significance it must be in connection with a determination of issue. Hearings provide the basis for determinations, and an opportunity to be heard is an opportunity to influence decision . . . ."

In Bowles v. Baer, 7 Cir., 142 F. 2d 787 (1944) the Court of Appeals for the Seventh Circuit explained the difference between an investigation and a hearing, and as to a hearing the Court said:

"On the other hand, in a hearing there are parties, and issues of law and of fact to be tried, and at the

conclusion of the hearing, action is taken which may materially affect the rights of the parties."

The Court must give some weight to the terms "for a hearing," "a prompt and fair hearing" and "such hearing", as used in Sec. 115-178, unless these terms are to be rendered meaningless. If the written application is all that is needed, then the provision for a hearing would be totally without meaning. The basic constitutionality of this statute has been upheld by the Court of Appeals for this circuit, and I am of the opinion that a substantial and good faith compliance with all administrative remedies is required before a plaintiff is entitled to be heard in a court of equity. When the conduct of the plaintiffs in this case is weighed against the background of the provisions of the state statutes relating to administrative remedies, it must be concluded that there has been no adequate exhaustion of administrative remedies and that, until after there has been an exhaustion of those remedies, the plaintiffs cannot be heard to complain in a court of equity.

And finally, a word about the contentions of the defendant that matter of interpretation of the meaning of the North Carolina Assignment and Enrollment of Pupils Act, as it applies to this particular case, should first be determined by the North Carolina courts, and that an appeal to the Superior Court of North Carolina as provided by Sec. 115-179, is a part of the administrative remedy and should be exhausted before appeal to the federal courts. Both of these contentions are effectively answered against the defendant by the late Chief Judge Parker in Carson v. Warlick, supra, where he said:

"It is argued that the statute does not provide an adequate administrative remedy because it is said that it provides for appeals to the Superior and Supreme Courts of the State and that these will consume so much

time that the proceedings for admission to a school term will become moot before they can be completed. It is clear, however, that the appeals to the courts which the statute provides are judicial, not administrative remedies and that, after administrative remedies before the school boards have been exhausted, judicial remedies for denial of constitutional rights may be pursued at once in the federal courts without pursuing state court remedies. Lane v. Wilson, 307 U. S. 268, 274, 59 S. Ct. 872, L. Ed. 1281. Furthermore, if administrative remedies before a school board have been exhausted, relief may be sought in the federal courts on the basis laid therefor by application to the board, notwithstanding time that may have elapsed while such application was pending."

The defendant further urges that, notwithstanding the holding of the Court of Appeals in the Carson case, this court should, under the doctrine of "equitable abstention", in an equitable action of this type, and in the exercise of sound discretion, withhold a decision in this case until the Attorney General can institute an action in the State Court of declaratory judgment or other appropriate remedy whereby the Assignment and Enrollment of Pupils Act can be construed by the North Carolina Supreme Court. While a number of cases are cited in support of this contention, I do not believe these cases are applicable to the type of case here involved and, in any event, do not feel justified in exercising my discretion in the manner urged by the defendant.

II

Whether the Minor Plaintiff Was Refused Reassignment to the Broughton High School on Account of His Race

In view of the conclusion I have reached in regard to the exhaustion of administrative remedies, it is necessary to discuss the reason why the Board of Education denied the minor plaintiff admission to the Broughton High School. There is no way the Court can anticipate what the action of the Board might have been had the plaintiffs pursued the administrative remedies afforded by law by personally appearing before the Board for a hearing. Pure speculation on my part would serve no useful purpose. The plaintiffs are not entitled to have this proposition passed upon until their administrative remedies have been exhausted. This seems to be the conclusion reached in National Lawyers Guild v. Brownell, Cir. D. C., 225 F. 2d 552, 555 (1955), where the court said:

"We cannot assume in advance of a hearing that a responsible executive official of the Government will fail his manifest duty. Our conclusion on the point is that the plaintiffs must await the event rather than attempt to anticipate it."

Conclusions of Law

1. The Court has jurisdiction of the parties and the subject matter herein.

2. The plaintiffs failed to exhaust their administrative remedies under the North Carolina Assignment and Enrollment of Pupils Act prior to the institution of this suit.

3. The plaintiffs are not entitled to the relief prayed for.

A judgment will be entered in conformity with this opinion unless the plaintiffs file a written motion within ten days requesting that the case be retained on the docket for the purpose of giving them an opportunity to adequately exhaust their administrative remedies.

This the 20th day of August, 1958.

/s/ EDWIN M. STANLEY
United States District Judge for the Middle District of North Carolina, acting under a general designation to hold Courts in the Eastern District of North Carolina.

APPENDIX E

PORTIONS OF BOARD'S REGULATIONS ADOPTED MAY 1957

"Each child presently attending a school by assignment from this Board is assigned to the same school for the year 1957-1958; provided, however that those children who have satisfactorily completed the course of instruction in any school are assigned for the school year 1957-1958 to the next succeeding grade in the school to which they would normally have been assigned, and children entering the first grade are assigned to the school in which they attended the pre-school clinic."

APPENDIX F

N. C. Pupil Enrollment Act of 1955

S. B. 9 Chapter 366

An Act to Provide for the Enrollment of Pupils in Public Schools.

The General Assembly of North Carolina do enact:

Section 1. The county and city boards of education are hereby authorized and directed to provide for the enrollment in a public school within their respective administrative units of each child residing within such administrative unit qualified under the laws of this State for admission to a public school and applying for enrollment in or admission to a public school in such administrative unit. Except as otherwise provided in this Act, the authority of each such board of education in the matter of the enrollment of pupils in the public schools within such administrative unit shall be full and complete, and its decision as to the enrollment of any pupil in any such school shall be final. No pupil shall be enrolled in, admitted to, or entitled or permitted to attend any public school in such administrative unit other than the public school in which such child may be enrolled pursuant to the rules, regulations and decisions of such board of education.

Sec. 2. In the exercise of the authority conferred by Section 1 of this Act upon the county or city boards of education, each such board shall provide for the enrollment of pupils in the respective public schools located within such county or city administrative unit so as to provide for the orderly and efficient administrative unit of such public schools, the effective instruction of the

pupils therein enrolled, and the health, safety and general welfare of such pupils. In the exercise of such authority such board may adopt such reasonable rules and regulations as in the opinion of the board shall best accomplish such purposes.

Sec. 3. The parent or guardian of any child, or the person standing in loco parentis to any child, who shall apply to the appropriate public school official for the enrollment of any such child in or the admission of such child to any public school within the county or city administrative unit in which such child resides, and whose application for such enrollment or admission shall be denied, may, pursuant to rules and regulations established by the county or city board of education apply to such board for enrollment in or admission to such school, and shall be entitled to a prompt and fair hearing by such board in accordance with the rules and regulations established by such board. The majority of such board shall be a quorum for the purpose of holding such hearing and passing upon such application, and the decision of the majority of the members present at such hearing shall be the decision of the board. If, at such hearing, the board shall find that such child is entitled to be enrolled in such school, or if the board shall find that the enrollment of such child in such school will be for the best interests of such child, and will not interfere with the proper administration of such school, or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children there enrolled, the board shall direct that such child be enrolled in and admitted to such school.

Sec. 4. Any person aggrieved by the final order of the county or city board of education may at any time within ten (10) days from the date of such order appeal there-

from to the superior court of the county in which such administrative school unit or some part thereof is located. Upon such appeal, the matter shall be heard de novo in the superior court before a jury in the same manner as civil actions are tried and disposed of therein. The record on appeal to the superior court shall consist of a true copy of the application and decision of the board, duly certified by the secretary of such board. If the decision of the court be that the order of the county or city board of education shall be set aside, then the court shall enter its order so providing and adjudging that such child is entitled to attend the school as claimed by the appellant, or such other school as the court may find such child is entitled to attend, and in such case such child shall be admitted to such school by the county or city board of education concerned. From the judgment of the superior court an appeal may be taken by any interested party or by the board to the Supreme Court in the same manner as other appeals are taken from judgments of such court in civil actions.

Sec. 5. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 6. This Act shall be in full force and effect from and after its ratification.

In the General Assembly read three times and ratified, this the 30th day of March, 1955.

APPENDIX G

North Carolina General Statutes, Chapter 115, Article 21

115-176. Authority to provide for assignment and enrollment of pupils; rules and regulations.

Each county and city board of education is hereby authorized and directed to provide for the assignment to a public school of each child residing within the administrative unit who is qualified under the laws of this state for admission to a public school. Except as otherwise provided in this article, the authority of each board of education in the matter of assignment of children to the public schools shall be full and complete, and its decision as to the assignment of any child to any school shall be final. A child residing in one administrative unit may be assigned either with or without the payment of tuition to a public school located in another administrative unit upon such terms and conditions as may be agreed in writing between the boards of education of the administrative units involved and entered upon the official records of such boards. No child shall be enrolled in or permitted to attend any public school other than the public school to which the child has been assigned by the appropriate board of education. In exercising the authority conferred by this section, each county and city board of education shall make assignments of pupils to public schools so as to provide for the orderly and efficient administration, health, safety, and general welfare of the pupils. Each board of education may adopt such reasonable rules and regulations as in the opinion of the board are necessary in the administration of this article.

115-177. Methods of giving notice in making assignments of pupils.

In exercising the authority conferred by 115-176, each county or city board of education may, in making assignments of pupils, give individual written notice of assignment, on each pupil's report card or by written notice by any other feasible means, to the parent or guardian of each child, or the person standing in loco parentis to the child, or may give notice of assignment of groups or categories of pupils by publication at least two times in some newspaper having general circulation in the administrative unit.

115-178. Application for reassignment; notice of disapproval; hearing before board.

The parent or guardian of any child, or the person standing in loco parentis to any child, who is dissatisfied with the assignment made by a board of education, may within ten (10) days after notification of the assignment, or the last publication thereof, apply in writing to the board of education for the reassignment of the child to a different public school. Application for reassignment shall be made on forms prescribed by the board of education pursuant to rules and regulations adopted by the board of education. If the application for reassignment is disapproved, the board of education shall give notice to the applicant by registered mail, and the applicant may within five (5) days after receipt of such notice apply to the board for a hearing, and shall be entitled to a prompt and fair hearing on the question of reassignment of such child to a different school. A majority of the board shall be a quorum for the purpose of holding such hearing and passing upon application for reassignment, and the decision of a majority of the members present at the hearing shall be the decision of the board. If, at the hearing,

the board shall find that the child is entitled to be reassigned to such school, or if the board shall find that the reassignment of the child to such school will be for the best interest of the child, and will not interfere with the proper administration of the school, or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children there enrolled, the board shall direct that the child be reassigned to and admitted to such school. The board shall render prompt decision upon the hearing, and notice of the decision shall be given to the applicant by registered mail.

115-179. Appeal from decision of board.

Any person aggrieved by the final order of the county or city board of education may at any time within ten (10) days from the date of such order appeal therefrom to the superior court of the county in which such administrative school unit or some part thereof is located. Upon such appeal, the matter shall be heard de novo in the superior court before a jury in the same manner as civil actions are tried and disposed of therein. The record on appeal to the superior court shall consist of a true copy of the application and decision of the board, duly certified by the secretary of such board. If the decision of the court be that the order of the county or city board of education shall be set aside, then the court shall enter its order so providing and adjudging that such child is entitled to attend the school as claimed by the appellant, or such other school as the court may find such child is entitled to attend; and in such case such child shall be admitted to such school by the county or city board of education concerned. From the judgment of the superior court an appeal may be taken by any interested party or by the board to the Supreme Court in the same manner as other appeals are taken from judgments of such court in civil actions.

APPENDIX H

EXCERPTS OF TESTIMONY FROM TRANSCRIPT

JOSEPH HIRAM HOLT, JR. (transcript), testified as follows:

Direct Examination:

Q. How many years have you been attending Ligon High School? A. Two years.

Q. Two full school years? A. Yes, sir.

Q. School year is from September through May? A. Yes, sir.

Q. Have you attended school at Ligon High School continuously during those two years? A. Yes, sir.

Q. Do you know where Needham Broughton High School is? A. Yes, sir.

Q. How far from where you live? A. About eight or nine blocks approximately.

Q. You know whether East, South or North? A. It is approximately Southeast from our house.

Q. Where is Ligon school in relation to your house? A. It is Southeast too.

Q. Is Needham Broughton located between Ligon school and your house? A. Yes, sir.

Q. What street is Needham Broughton school located on? A. Peace Street.

Q. Do you go anywhere near Needham Broughton school when you go to Ligon school? A. Yes, sir.

Q. What proximity to that school? A. We go down Peace Street right past Needham Broughton.

Q. Who is that? A. We ride a bus to school.

Q. Who is on that school bus? A. City Coach Company.

Q. When you say "We ride to school, ride a school bus," who is "We"? A. Rest of the high school students in Oberlin.

Q. Where you live is called Oberlin? A. Yes, sir.

Q. Do all the pupils from Oberlin ride that school bus to Ligon?

Objection by Defendant Sustained.

Q. Do you know how the other students who attend Ligon school reach Ligon High School from Oberlin?

Objection by Defendant Overruled.

A. Yes, sir. They ride the same bus I ride.

Q. Is there more than one bus? A. No, sir, just one bus.

Q. About how many ride that bus? A. I don't know right offhand.

Q. The students that ride the bus from Oberlin to Ligon, are they white or colored?

Objection by Defendant Overruled.

A. They are colored.

Q. Of what race are the students who attend Ligon school? A. They are colored.

Q. Any white at Ligon school?

Objection by Defendant Overruled.

A. No, sir.

Q. During the school year of 1956-57 did you go to Ligon school by way of bus? A. Yes sir.

Q. During that school year were the students who rode by bus colored or white? A. They were colored.

Q. During that same school year were the students who attended Ligon School colored or white? A. They were colored.

Q. During the same school year were the students who attended Ligon school colored or white?

Objection by Defendant Overruled.

A. They were colored.

Q. No white at all at Ligon school during the school year 1956-57?

Objection by Defendant Overruled.

A. No, sir.

Q. Is there any particular course of study that you are pursuing? A. No, sir.

Q. Just regular high school courses? A. Yes, sir.

The Court: Do you still live at the same place you lived during the months of June, July and August of 1957?

A. Yes, sir.

Q. How long have you lived at that address? A. Fifteen years.

Q. That is about all your life? A. Yes, sir.

Q. Still live at the same place? A. Yes, sir.

JESSE O. SANDERSON testified as follows:

Direct Examination:

* * * * *

Q. How many high schools does the Board maintain in Raleigh? A. Two senior high schools.

Q. What are they? A. Needham Broughton and J. W. Ligon.

Q. Relative to direction where is J. W. Ligon High School? A. Eastern part of the city on East Lenoir Street.

Q. Where is Needham Broughton school? A. On Peace Street, near the center of the city I guess.

Q. You know where the Holts live on Oberlin Road? A. Yes.

Q. Know about how far that is from Broughton school?
A. I would estimate approximately a mile or a little less.
Q. Children of what race go to the Broughton school?

Objection by Defendant Overruled.

A. White students.
Q. You have no colored students at Broughton school at all?

Objection by Defendant Overruled.

A. No.
Q. Have there ever been any colored students at Broughton school?

Objection by Defendant Overruled.

A. No.
Q. Children of what race go to Ligon school?

Objection by Defendant Overruled.

A. Colored.
Q. Have there ever been any white students at that school?

Objection by Defendant Overruled.

A. No.
Q. How old is Ligon school? A. I believe we have completed the fifth year, the year that just ended.
Q. June, 1958 was the fifth? A. Yes, sir.
Q. How old is Needham Broughton school? A. Been in operation since 1929. I believe that was the first year.
Q. That school has been continuously in operation since 1929? A. Yes.
Q. And Ligon school in continuous operation for how many years? A. I am rather certain it is five.

Q. What was the policy that the Board followed prior to May, 1954 relative to enrollment of students in Needham Broughton school and Ligon school?

Objection by Defendant Overruled.

A. If I may ask a question that would help me answer the question. I don't know the significance of 1954.

Q. Prior to the United States Supreme Court decision in the Brown v. Elliott case what was the policy pursued by the Board?

Objection by Defendant Sustained.

Q. You are familiar with the Brown v. Elliott school case? A. Yes.

Q. Prior to the decision in this case what was the policy followed by the Board in enrolling pupils in the two high schools here?

Objection by Defendant Overruled.

A. White students were assigned to Needham Broughton and Negro students assigned to Ligon.

Q. Since this decision what has been the policy of the Board of Education in Raleigh in regard to assigning students?

Objection by Defendant Overruled.

A. It is not quite a question, I would know how to answer. The policy has been substantially the same for sixteen years until the new regulation and policy of which there is a copy in the exhibits adopted by the Board in 1957.

Q. You stated to me that there were no colored students at Broughton school? A. That's right.

Q. And there were no colored students there in the school term 1956-57?

Objection by Defendant Overruled.

A. No.

Q. In '55 and '56 what was the attendance area for Needham Broughton? A. Entire city of Raleigh.

Q. And for Ligon? A. For the colored it was the entire administrative unit.

Q. The school children in 1957 were assigned to the same schools they had been in for the previous years? A. That's correct.

Q. So there was really no change in the policy so far as the initial assignment of students in '57 was there?

Objection by Defendant Overruled.

A. There were changes. Procedures for initial assignments were changed.

* * * * *

Q. You have received other applications for reassignment from various pupils from time to time asking that they be reassigned to different schools? A. Yes.

Q. The Board, on those occasions, has not requested the parents to be present when the Board considered it? A. Best I recall some have been declined and some approved and no other parent has asked for a rehearing.

Q. When you initially consider an application for a change of pupil assignment the Board has not followed a practice of asking parents to be present? A. No. On unusual circumstances the Board would make that request.

Q. Did the Board consider this application an unusual circumstance? A. It was certainly not in the ordinary category of request for change of assignment.

Q. Why do you say that? A. It was out of the ordinary.

Q. Why do you say that? A. It was the first request that had come to the Board.

Q. In requesting the parents to come to the meeting the Board was taking into consideration this was an applica-

tion for a colored child to attend a school previously attended by white children?

Objection by Defendant Overruled.

A. The Board was aware that the applicant was colored and the application gave that information and the Board's desire to reach a right decision motivated the Board to request the plaintiffs to be present to furnish additional information that might be needed.

Q. What information would be needed?

Objection by Defendant Overruled.

A. I couldn't answer. I am not a board member. I am sure each board member had made up her or his mind about that.

Q. That was the first time any parent had been notified to attend the initial consideration by the Board of application for change of assignment? A. Under the policy adopted a month or two prior to that time.

Q. And there had been several applications considered? A. There had been no applications considered prior to August 6.

Q. There were several considered on August 6? A. There were several but the applications gave the Board all information needed in acting on those applications with the exception of one.

Q. None of those parents were asked to attend? A. No, because the Board didn't feel it needed additional information.

Q. You know how many applications were considered on August 6 by the Board? A. I would have to venture a guess.

Q. That does appear in the minutes? A. Yes.

Q. I believe the Board used a form for the request to change pupil assignment? A. Yes.

Q. The Holt application was on the same form the other applications were on? A. Yes.

Q. And the Holt application purported to answer each question that was on that form? A. The information requested, that is factual information. Reason for change of assignment would have to be filled in by the applicant. The section that would request reasons for change.

Q. The Holt form stated the reasons? A. It states some reasons.

Q. The Board wasn't satisfied with the reasons they stated? A. I couldn't tell you whether they were dissatisfied with the reasons. The only statement I could make that I would be expressing opinions that individual board members had was it didn't contain enough for them to act wisely on that application.

* * * * * *

Q. Was any action taken on August 28, which I believe is the next time this thing came up for hearing? A. As I recall, a committee was appointed after the hearing to make some study of its own and to bring back recommendation of the Board to make sure the Board was making a wise decision. I believe that committee made report on August 28.

Q. Were any other applications for change of assignment referred to the committee for study and recommendation? A. No, not at that time.

Q. As far as you know, and since you have been operating under the resolutions that the Board has now, was this the first time a committee was appointed to study an application for change of assignment?

Objection by Defendant Overruled.

A. Yes.

Q. And it hasn't been done since? A. No.

Q. Have there been application for change of assignment since? A. Yes, there have been applications that were

apparently so clear no reason for filing the, that there was apparently no need for further study.

Cross Examination:

* * * * *

Q. Will you state whether or not since you have been superintendent of the schools and since 1954 there has ever been any application by a white pupil to be assigned to Ligon High School submitted to the Board? A. No.

Q. Do you know whether or not high school students of the white race who live in areas nearer to Ligon than to Broughton are assigned to Broughton High School? A. They are.

Q. You referred also, in an answer to a question by His Honor, to the practice of assigning colored students to colored schools. Would you state whether or not since 1954 except for the application of the Holts and the two letters you received from persons other than the Holts, there has been any suggestion as to any particular pupil being re-assigned to a white school, any colored pupil to a white school? A. No.

* * * * *

Q. Prior to 1954 you say that the schools were operated on the basis of assignment of colored pupils to Ligon School and its predecessor, and white students to Broughton High School? A. Yes.

Q. Do you know whether that was action pursuant to law existing at that time? A. It was in accordance with the constitution of North Carolina and state law as far as I know.

Q. And the regulations adopted in May, 1957 were intended by the Board as a policy pursuant to law existing at the time of adoption?

Objection by Plaintiff Sustained.

If permitted to answer the witness would have said "yes".

Recross Examination:

• • • • • •

The Court: Do you have copies of the report cards of the students made up for the individual schools?

A. Yes, sir.

Q. Are copies of those sent to the central office? A. No, sir.

Q. Copies are retained where? A. Report cards retained at individual schools during the year and given to the student at the end of the year. We have permanent records, but no report card forms.

Q. Records show grades? A. Yes, sir, filed in individual schools.

Q. Are they ever sent to the central office and filed there? A. No sir.

Q. But a Board member, if he wanted to know what kind of a student he was, would have access to that information? A. Yes, sir.

LEROY MARTIN testified as follows:

Direct Examination:

• • • • • •

Q. How long have you been a member of the City School Board? A. Since 1938 I believe.

Q. Have you been a member of the Board continuously since appointed in 1938? A. Yes.

Q. You were a member of the School Board in June, 1957? A. Yes.

Q. Were you a member of the Board at the time rules and regulations governing the assignment of pupils was adopted? A. Yes.

Q. Were you present when those regulations were voted upon? A. Yes.

Q. You are familiar with those regulations? A. Yes, generally.

Q. Prior to the adoption of those rules and regulations in 1957 you were familiar with the fact that the schools in Raleigh were composed along racial lines? A. Right.

Q. Are you familiar with the Holt application for reassignment? A. Generally.

Q. At the time the Holt application was filed did you know that the Holts were colored? A. Yes.

Q. And when the matter came up for consideration on August 6, 23rd and 28th you knew the Holts were colored? A. Yes.

Q. Mr. Martin, did you know that the Holts were asking for reassignment because they were complaining of the segregated school pattern in Raleigh? A. No, I don't believe so.

Q. You were familiar with the application blank? A. Yes.

Q. You heard the application read or read it? A. I don't know, but I understand they wanted to be transferred from Ligon to Needham Broughton.

Q. You knew that Ligon was a school which colored school children attended? A. That's right.

Q. Did you vote on the original motion made by Mr. York on August 6 relative to the approval or disapproval of the application of Holt? A. Yes, I believe I seconded it. I believe I did.

* * * * *

Q. Mr. Martin, what about the motion did you agree with? A. I particularly agreed with the motion which said it was not in the best interest of the child.

Q. Why did you think that? A. That is a long story involving my philosophy but the school [illegible] operated for

children and nothing else. It is our duty to assign pupils to schools taking into consideration, and that alone. What is the best interest of the child and not the parents or the social order.

Q. Why do you say it wouldn't have been in the best interest of the Holt child? A. In the first place I hadn't had opportunity to see or talk with him or his parents. I had personally hoped they would come before the Board for hearing. They hadn't done so and I didn't have enough information. It didn't seem to,—here was a school, the Ligon school. I was chairman of the building committee when we built it. We spent about a million and two hundred and fifty thousand dollars there. We had a good faculty, a good school. The boy had a ride there every day and he would have had to walk to Needham Broughton School. That was the best judgment I had. My judgment might not be good but that was the best judgment I could exercise.

Q. You are familiar with the fact that in the application blank he wanted to be reassigned because he wanted to erase the racial stigma from his scholastic endeavor? A. Yes, I didn't think it to his best interest or I would have voted for him to go to Needham Broughton School.

Q. You say you believe the school should be operated for the benefit of the child and not any social order? A. That's right.

Q. I believe I understand you to say you hadn't talked to or hadn't seen the Holt child? A. No.

Q. Isn't it true you usually consider applications and pass on them without seeing the children involved? A. Yes, but if extraordinary situation we sometime see the parent and child and everybody involved.

Q. Did you consider the Holt case an extraordinary case? A. Yes.

Q. Why? A. Because moving from one high school to another, and both were fine and accredited high schools and it was a change in the situation.

Q. What situation? A. He had been going to one school and wanted to go to another.

Q. Wasn't the fact he was trying to get from Ligon into Broughton, he being a Negro and Broughton attended almost solely by white, of some importance? A. Yes, but I wouldn't say that was all important.

Q. But that was a factor? A. Yes.

Q. Was that also a factor in causing you to second the motion? A. Yes, I didn't think it to the best interest of the child to attend Needham Broughton High School as contrasted to Ligon High School.

Q. Was that because of the fact he was colored? A. No. I wouldn't say that.

Q. What is there about attending Ligon and changing to Broughton other than color that would be involved? A. It was sort of reflection on Ligon School and people operating it. I knew of no reason why a child shouldn't get as good opportunity at the Ligon School as he could at the Broughton School. It is an excellent plant, has a good faculty. I don't know of a better faculty. Good training. I knew he had free transportation to the Ligon School.

Q. He could have gotten to the Broughton school by walking? A. Yes.

Q. You knew his complaint was based partially on the fact that he claimed he was being segregated at the Negro school? A. I admit that was right.

Q. You were familiar with his application blank? A. Yes, I was familiar with the application blank.

Cross Examination:

Q. You say you know no reason why as good opportunity afforded at Ligon. Did the Holts choose to give you any reasons other than that on the application blank? A. No. I had never seen the Holts until yesterday.

Q. The application blank which you hold in your hand, on page 3 is stated several reasons isn't it? A. Yes, distance, and so forth and so on.

Q. Were you interested in determining what was behind those reasons assigned? A. Yes. I was very much interested in that. I would have been happy to have asked the young Holt boy what he found wrong with the Ligon school. As a school board member I was interested to know if there was anything wrong with the Ligon school.

Q. You were particularly interested in knowing what kind of a boy this boy was? A. Yes.

* * * * *

Q. In connection with the factors which would influence your decision one way or the other as a member of the board I dare say you would be interested in such things as the emotional makeup of the child? A. Yes.

Q. That would be determined from an examination of him? A. Yes. Try to take into consideration many, many things. Hard to put your finger on what would enter into it.

Redirect Examination:

Q. Pursuant to that feeling you, with other members of the board were instrumental in instructing the board to notify this boy and his parents of this meeting? A. That's right.

Q. You say most applications deal with where people move from one section to another? A. Some of them. Some want to move from one school to another where their parents are working.

Q. In those particular situations you don't actually see the parents of the children? A. I would say not generally. Where it is apparent there are very good reasons for it, what we know as hardship cases.

Q. You spoke of the emotional makeup of a child being taken into consideration. A. I said I would have been interested in that.

Q. In these other cases, hardship cases, you are not particularly interested in emotional makeup? A. No. They are generally routine.

Q. When an application is based on the child wanting to be released from racial segregation you wouldn't consider that routine? A. I wouldn't because that is a little unusual in Raleigh.

Recross Examination:

* * * * *

> The Court: The question was asked you, as I recall, whether the fact that this minor plaintiff Holt was colored and wanted to go to the white school, if that created an extraordinary situation in your mind and you said it did. Then a question was asked you whether or not the fact that there was a colored student wanting to gain admission into what had theretofore been an all white high school was one of the factors that caused you and the board to vote against the reassignment as petitioned for, and I am not sure as to what you answered.

A. I am not sure what I answered then but I know the answer would be that would be a factor, but to me not a compelling factor in using my discretion what school would this child best attend and get the most out of the educational program. You couldn't say any specific thing, but that would be one of the things of course.

W. C. ENLOE, Board Chairman, testified as follows:

Cross Examination:

* * * * *

Q. Mr. Enloe, did you yourself desire the presence of Holt and his parents at the hearing which was ordered pursuant to their request?

Objection by Plaintiff Overruled.

A. Quite definitely because I expected to have to vote. There was possibility I might have to vote and I certainly wanted to acquaint myself. There was a possibility there could be a three-three tie.

Q. You didn't feel that you were qualified to vote without such examination of the Holts? A. Certainly not.

Q. You didn't, therefore, feel that the application and what it said on it was sufficient to permit you to make up your mind on the application? A. I wanted to talk to young Joseph Holt to see if he or his parents personally thought there would be some advantage to his going to Needham Broughton instead of Ligon. The first information I knew about this was in the hands of attorneys. I frankly doubted the seriousness of the application because it was handled so unusual. That is why the hearing was held. The average application sent through, no one appears, certainly not when his attorney appears who says, "I am representing Mr. and Mrs. Jones". It showed every evidence of lack of sincerity and therefore I wanted to talk to Mr. and Mrs. Holt and young Holt. Some of us talked about the possibility of going out to their house.

Q. There was a great deal more information you desired and you didn't get it at the August 6 or 23rd meeting? A. We were told in a letter that he would speak for the Holts and therefore we understood there would be no advantage in our trying to talk to them.

Q. I understood you to say members of the board even considered going out to see the Holts? A. That is correct.

Q. You didn't follow that but felt that the opportunity for hearing on August 23 was sufficient? A. No, this was after they failed to appear. When they failed to appear we thought of the possibility of going out. We were very much concerned, why the boy felt he would be better taught at Needham Broughton than at Ligon. We wanted to talk to him and his parents. When they failed to show up at the public hearing then we discussed going out to see them.

* * * * *

Q. Mr. Enloe, I take it that there were other factors that were interesting to you, such as whether or not this boy might fit into the school. A. Yes. Frankly one of the questions I would have asked him would have been did he realize if he was the only colored boy in that school he was likely to be taunted by the other students and would that affect him emotionally. I was not expecting physical harm to the boy but did expect physical and emotional strain. I didn't know this boy. I assumed he had a good character and I wanted to talk to him to see if he wasn't there to be a trouble maker. There is no reflection on him because I didn't know him.

Redirect Examination:

Q. You were not on the board when this application was filed? A. No.

Q. You didn't go on the board until July 1? A. No.

Q. This application was filed in June? A. I think so.

Q. You didn't know anything about it until July 1? A. I think I made that clear.

Q. So of your own knowledge you couldn't say that this application originated with his attorneys or not? A. No. That's the reason I wanted to talk with the boy.

* * * * *

Q. Usually the Board considers the application on application blank? A. Yes.

Q. And when the Holt application was pending there were other applications pending for reassignment which were considered on the six-day of August at which no parent was present? A. Oh, yes.

Q. Most of your applications are considered by the Board without the presence of parents? A. That is correct.

Q. The Holt situation is the only situation where the parents were invited? A. That is the only case we were dealing with you or your law firm instead of the parents of the child. The handwriting was on the wall. You exposed your hand. If you had let them gone ahead and let us acted.

Q. Isn't it a fact that the board wrote a letter asking the Holts to come to the meeting before we wrote and said they were not coming? A. I don't know that as a fact but if you say so I am sure it is true.

* * * * *

Q. You stated unless Holt attended the meeting or you had a chance to talk to young Holt you wouldn't know whether he was qualified. What did you mean? A. I don't think I said qualified.

Q. You said you didn't feel qualified to pass on the Holt application unless you talked to him? A. That is correct.

Q. Why wouldn't you be able to pass on it? A. Same as no judge would be able to pass on this unless he had the record.

Q. You had passed on other applications without having the school child present and why were you giving such consideration to the Holt case? A. Because that element of doubt hadn't been erased.

Q. What element of doubt? A. Your letter.

Recross Examination:

* * * * *

The Court: You came to the Board July 1?

A. Yes, sir.

Q. As I understood your testimony you said this was handled in an unusual way because the application was unusual. A. I believe I said first information I had was because of correspondence I received from the attorney.

Q. As I understood you you said that made you all the more careful to follow the exact letter of the law? A. Yes, sir.

Q. As I read the statute it makes no provision for hearing on that original application but when they are dissatisfied and ask for reassignment on written application they ask for hearing. In this case you are asked for hearing on the written application rather than on any further appeal. In fact you deny it. A. I think that was more for information of the board. We wanted to satisfy ourselves that this was a legitimate request from the boy and not as it was obvious to us.

Q. What do you mean by legitimate request? Whether or not he really wanted to enter this school? A. Yes, sir.

Q. Was there some doubt in your mind about that? A. There still is.

Q. That he doesn't really want to go to Broughton?

J. W. York testified as follows:

Direct Examination:

* * * * *

Q. You were familiar with the Joseph Holt application for change of assignment from Ligon High School to Needham Broughton? A. Yes.

Q. Did you know that Holt was colored? A. Yes.

* * * * *

Q. Are you familiar with the fact that only Negro children are enrolled at Ligon High School? A. Yes.

Q. And that only white at Broughton High School? A. Yes.

Q. Were you familiar with that fact when you made that motion last fall? A. Yes.

Q. And that Holt asked for reassignment because he contended he was being segregated by being required to attend Ligon High School? A. As I recall he asked for reassignment purely on race issue.

Q. Is that the reason you made the motion to decline it? A. That's one of the reasons.

Q. What other reasons? A. That it was not in the best interest of Joseph Hiram Holt for him to attend Broughton school and the motion stated "at this time". That doesn't mean at some future dates or some future reasons we wouldn't consider assigning him.

Q. He was asking reassignment because he was claiming he was being segregated? A. I didn't think that was sufficient reason.

Q. His claim of segregation and desiring to attend the school was not sufficient? A. He asked reassignment purely on the race issue.

Q. You declined it on the basis that he asked for it? A. I didn't decline it. I made the motion.

Q. What did you mean when you said "to his own best interest"? A. In my judgment it was not Joseph Hiram Holt's best interest to be sent to Broughton High School on August 6, 1957.

Q. Why? A. There were many reasons. One of the chief ones was he would have been the only colored pupil in Broughton High School.

* * * * *

Cross Examination:

* * * * *

Q. You were familiar with the application filed by the Holts? A. Yes.

Q. I show you the application, and particularly page 3 and the material there which was assigned by the parents the reasons for requesting application. Did you, in your deliberations, on your part desire to interrogate the boy as in that paragraph? A. I did and so stated in the meeting I would like to ask the boy and his parents some questions.

Q. There were some words in that paragraph in reference to J. W. Ligon? A. I can't believe that the boy or the parents feel that it is for the betterment of the boy himself. I think they have something far more vast in the future. We know this thing is coming and what I want to do when it comes into Raleigh I want it to be handled to the best interest of both sides. I don't want any trouble and I don't think we will have trouble. I believe the school board can handle this thing and I think if they leave it in our hands and not try to force something until we think it is the proper time I think it will be accepted by the people.

The Court: You say you don't think this is quite the opportune time?

A. Yes, sir. I think it will require a program. I have discussed it with people on both sides. With ministers. I have plans in my mind but I don't think it is time to divulge those plans. You can't put a date on it. I don't know whether this year or next year. Brute force can't make things right. The school board can't decide on something and everybody say, "That's right, let's go." If that was the only problem we could have solved that right quick.

* * * * * *

Q. From the statement you just made is it your opinion that last year when this Holt application was filed and was before the board that that was not the time to send a colored student to Needham Broughton school? A. That might have been one of my thoughts.

Q. That was one of your thoughts last August when this thing was before the Board? A. Yes.

* * * * *

A. Yes, it says it is unfair discrimination to force this boy to attend J. W. Ligon High School.

* * * * *

The Court: I understood you to say as you viewed the application for reassignment that the request was based mainly on the racial issue, that this applicant simply wanted to go to a school that had theretofore been maintained solely for whites and that you didn't think that was the reason that that was one of the factors that entered into your consideration?

A. I didn't think that was sufficient reason.

Q. He said something about the mileage. Did you give consideration to that? A. Very little. He is transported to Ligon High at no expense to himself.

Q. And there was another question I didn't understand in making your motion, and you referred to public interest of all the schools and citizens of Raleigh and of Holt. You said you thought he would be better off, and I believe you said because he would be the only colored child over there. A. Yes, sir. I said the only colored child.

Q. Did I understand you to say race and color was one of the reasons that prompted you to make the motion? A. I said one of them. I can only speak for myself. We were anxious to get the Holts and the boy and question them to see if any other reason such as courses he wanted to take

that he couldn't get at Ligon. Anything other than the fact it was a colored application.

Q. Is it your opinion that the Board treated it as such and acted as such? A. Yes, sir. We did everything we could to get the boy and his parents to attend the meetings and they refused.

Q. And since they did that do you feel that the Board based it on color? A. I say one of the factors.

* * * * *

Q. Was there any communication to these people other than that letter that you wrote them? Were you conscious of any member of the Board individually requesting someone else indicating to these people that any specific information was desired other than the letter written by the Superintendent asking them to come in for a conference? A. Conference as they requested. Let me say this. This first meeting was held August 6 but prior to the August 6 meeting we had letters from the attorneys representing the Holts which in effect put us on notice. Even though we were going to hear the application August 6th, the applicant had already written attorneys before we heard the first application, so at the August 6th meeting we felt sure they were going to request a hearing. We wanted to question the parents and boy and get at the basic facts to see if any justification for this boy being transferred to Broughton High other than color. On the other hand I didn't think we should assign a student to a new school solely on the basis of color.

Q. You say you didn't believe that you should assign a child solely on basis of color, that is if he just wants to attend a school operated for writes and if he gives that as the sole reason but lives in a school district where white children are attending that white school, question about district lines, and we are talking about August 6, 1957, that that application should be denied if he bases it

solely on color? A. That is my opinion, and by the same token I don't think we should assign any students from one school to another based purely on the color situation. There should be other reasons, such as curriculum, courses that cannot be had at Ligon but can be had at Broughton School. Students' academic life other than just the color.

Q. Are you thoroughly familiar with the area where the plaintiff lives? A. Yes, sir.

Q. And white students live in that same area? A. Yes, sir.

* * * * *

Redirect Examination:

* * * * *

Q. You say you wanted to ask the Holts some questions. A. That's right.

Q. Tell us the nature of the information you wanted to elicit from the Holts?

Objection by Defendant Overruled.

A. The first thing I wanted to find out was what is wrong with Ligon High School. It is a graded school and we have a very fine school and we are very proud of it, but the nature of the other questions have to do with academics.

Q. Mr. York, you said you were acquainted with the fact that the white children who live near Ligon school, who live nearer Ligon than Broughton, go to high school at Broughton School? A. Yes.

Q. You are also aware of the fact that colored children who live in Oberlin near Broughton school go to Ligon? A. I am aware of it.

Q. And also aware of the fact that there are no colored children in the white schools in Raleigh and no white children in the colored schools in Raleigh? A. I am aware of it.

APPENDIX I

UNITED STATES DISTRICT COURT

EASTERN DISTRICT, NORTH CAROLINA

RALEIGH DIVISION

JOSEPH HIRAM HOLT, JR., a Minor by His Next Friend, JOSEPH HIRAM HOLT, and JOSEPH HIRAM HOLT and ELWYNA HOLT,

Plaintiffs,

—v.—

THE RALEIGH CITY BOARD OF EDUCATION, A Body Corporate,

Defendant.

COMPLAINT

The Plaintiffs, complaining of the Defendant, respectfully allege:

1. (a) That the jurisdiction of the Court is invoked under Section 1331 of the Judicial Code (28 U. S. C. A., Sec. 1331), this being a suit which arises under the Constitution and Laws of the United States, wherein the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

(b) That the jurisdiction of this Court is also invoked under Section 1343(3) of the Judicial Code (28 U. S. C. A., Sec. 1343(3)), this being a suit authorized by law to be brought to redress the deprivation under color of law, statutes, regulation, custom and usage by a State of rights, privileges and immunities secured by the Constitution and

Laws of the United States, providing for equal rights of citizens of the United States, and of all other persons within the jurisdiction of the United States.

2. That the jurisdiction of this Court is further invoked under Section 2201 of the Judicial Code (28 U. S. C. A., Sec. 2201), this being a proceeding for a declaratory judgment and injunction, for the purpose of determining questions in actual controversy between the parties, to wit, the question of whether or not the custom and practice of the Defendant in maintaining and operating public educational facilities and public schools in the City of Raleigh, North Carolina, on a segregated basis, wherein white school children in said City attend and are taught in schools to which only white children are admitted, and in which school system Negro school children are compelled to attend public schools and public school facilities maintained exclusively for children of the Negro race; and the further question of whether or not the denial of admission to Plaintiff Joseph Hiram Holt, Jr., who is a Negro, by Defendant to the Needham Broughton Senior High School, which is one of the schools maintained by Defendant in said school system and to which school only children of the white race are admitted, solely and wholly on account of the race or color of the said Joseph Hiram Holt, Jr., is unlawful, unconstitutional and void, as being in violation of the Fourteenth Amendment to the Constitution of the United States and the laws of the United States, and the Constitution and Laws of the State of North Carolina.

3. That minor Plaintiff, Joseph Hiram Holt, Jr., is, as heretofore set forth, a member of the Negro race, is a citizen of the United States and of the State of North Carolina, is a resident of and domiciled in the City of

Raleigh, Wake County, North Carolina, and is a party to this action through his duly appointed Next Friend, Joseph Hiram Holt; that said minor plaintiff is within the age limits for eligibility to attend public schools in the City of Raleigh, North Carolina, to wit, being between the ages of six and twenty-one years; that the adult Plaintiffs, Joseph Hiram Holt and Elwyna Holt are also members of the Negro race, are citizens of the United States and of the State of North Carolina, and are residents of and domiciled in the City of Raleigh, Wake County, North Carolina, and are taxpayers of said City, of said County, of the State of North Carolina and of the United States.

4. That the Defendant, The Raleigh City Board of Education, is a Body Corporate by virtue of North Carolina General Statutes 115-27 and is the administrative body constituted by the laws of the State of North Carolina to maintain and operate public schools in and for the City of Raleigh, North Carolina; that said Defendant has by law exclusive control and jurisdiction over the assignment of children of school age and eligible to attend public schools to the various and sundry schools maintained by said Defendant in its school system; that said Defendant is and was at all times material hereto in fact maintaining and operating a system of public schools in the City of Raleigh, North Carolina, for the education and training of children in said City eligible by reason of legal age to attend such schools, and said Defendant is joined herein in its official and corporate capacity as such.

5. That the State of North Carolina has declared the education of children between the ages of six and twenty-one years to be a public function (N. C. Constitution, Article IX, Section 2; Gen. Stats. of North Carolina, Chapter 115, Article I), and all children within the age

limits of seven to sixteen years of age are by law (Gen. Stats. of North Carolina, Chapter 115, Articles 19 and 20), eligible to attend said publicly maintained schools.

6. That under the Constitution and Laws of the State of North Carolina, heretofore referred to, the Defendant is charged with the duty of maintaining and operating a system of public schools in the City of Raleigh, North Carolina, wherein tuition shall be free of charge to all of the children in said City between the ages of six and twenty-one years.

7. That under the Constitution and Laws of the State of North Carolina (North Carolina Constitution, Article IX, Section 2), the Defendant is forbidden to discriminate in favor of, or to the prejudice of either, white or Negro children in the provision of such system of public schools.

8. That, in pursuance of the duty imposed upon them by the laws of the State of North Carolina, the Defendant is in fact now maintaining a public school system in the City of Raleigh, North Carolina, which is supported by taxation of the residents and citizens of said City and of the State of North Carolina; that such school system is openly and patently maintained and operated by said Defendant on a segregated basis, with white school children attending some schools exclusively, and Negro children forced to attend schools maintained exclusively for them.

9. That as a part of the public schools maintained by Defendant in the City of Raleigh, as aforesaid, Defendant is maintaining and operating in the western part of the City of Raleigh, just a few blocks from the residence of Plaintiffs, an accredited and standard high school called and named "Needham Broughton Senior High School";

that over the years and ever since its founding and construction, Defendant has pursued the custom, practice and usage, and is now pursuing the custom, practice and usage of admitting to said Needham Broughton Senior High School only children of the white race; that, further, as a part of the school system maintained by Defendant in the City of Raleigh, said Defendant is maintaining and operating in the eastern part of the City of Raleigh, about three or four miles from the residence of Plaintiffs, a public school called and named "J. W. Ligon Junior-Senior High School"; that ever since its construction the Defendant has pursued the custom, practice and usage, and is now pursuing the custom, practice and usage of requiring and compelling all Negro school children of the junior or senior high school level to attend the said "J. W. Ligon Junior-Senior High School"; that pursuant to said custom, practice and usage, said Defendant has been compelling and requiring and is still compelling and requiring Plaintiff Joseph Hiram Holt, Jr., to attend the said "J. W. Ligon Junior-Senior High School."

10. That the custom, practice and usage of Defendant in requiring and compelling Plaintiff Joseph Hiram Holt, Jr., to attend the said "J. W. Ligon Junior-Senior High School" and refusing admission of said minor Plaintiff to the "Needham Broughton Senior High School" is followed and pursued by Defendant wholly and solely on account of the race or color of Plaintiff Joseph Hiram Holt, Jr., that is to say, because Plaintiff Joseph Hiram Holt, Jr., is a member of the Negro race; that, therefore, the aforesaid custom, practice and usage of said Defendant is unlawful, as being in violation of the rights vouchsafed to said minor Plaintiff by the Fourteenth Amendment to the Constitution of the United States, by the Laws of the United States and by the Constitution and Laws of the State of North Carolina.

11. That Plaintiff Joseph Hiram Holt, Jr., is directly and immediately aggrieved and burdened by the aforementioned customs, practice and usage on the part of Defendant in maintaining and operating the public school system of the City of Raleigh on a racially segregated basis and by the custom, practice and usage of said Defendant of compelling him to attend the aforesaid J. W. Ligon Junior-Senior High School and denying him admission to the aforesaid Needham Broughton Senior High School, all on account of his race or color, in that said minor Plaintiff is put to an inconvenience by having to travel several miles across the City of Raleigh from his home to the said J. W. Ligon Junior-Senior High School, passing enroute the said Needham Broughton Senior High School which, as aforesaid, is just about three blocks from his home, while white school children in minor Plaintiff's residential area are not so burdened and inconvenienced.

12. That the adult Plaintiffs herein, as citizens and taxpayers of the City of Raleigh and of the State of North Carolina, and as parents of minor Plaintiff, are similarly aggrieved by the customs, practices and usages herein complained of, in that as such parents, the inconvenience suffered and sustained by minor plaintiff is similarly visited upon them, they being directly and primarily responsible to their said son for the circumstances and conditions under which he has to obtain a public education, and they are further mentally and psychologically burdened by having to try to account to their said son as to why he may not attend the said Needham Broughton Senior High School, while white school children in his area are permitted so to do, and they, as parents of said minor Plaintiff, are otherwise mentally and physically burdened.

13. That as they were informed that they were compelled by law to do, Plaintiffs have petitioned and repetitioned Defendant to cease and desist from their aforesaid unlawful customs, practices and usages, but to no avail; that despite and in utter disregard of all petitioning on the part of Plaintiffs, Defendant has callously and indifferently ignored Plaintiffs' request for relief; that Plaintiffs are informed and believe and, therefore, allege that Defendant intends and proposes to continue and persist in their aforesaid unlawful customs, practices and usages; that in their quest for relief, Plaintiffs have exhausted all administrative remedies available to them.

14. That Plaintiffs are suffering irreparable injury and are threatened with irreparable injury in the future by reasons of the acts and practices herein complained of; that they have no plain, adequate or complete remedy to redress the wrong and illegal acts herein complained of other than by this suit for a declaration of rights and an injunction; that any other remedy to which Plaintiffs might be remitted would be attended by such uncertainties and delays as to deny substantial relief and occasion further damage, injury and inconvenience to Plaintiffs.

15. That there is between the parties hereto an actual controversy as hereinbefore set forth.

WHEREFORE, Plaintiffs respectfully pray the Court, upon the filing of this Complaint, as to the Court may appear proper and convenient, that the Court advance this cause on the docket and order a speedy hearing in this action, and that upon such hearing:

(1) That this Court adjudge, decree and declare the rights and legal relations of the parties to the subject matter herein in controversy, in such form that such declaration shall have the force and effect of a final judgment or decree;

(2) That this Court enter a judgment or decree declaring that the policy, custom, practice and usage of Defendant in maintaining and operating public schools in and for the City of Raleigh, North Carolina, on a segregated basis, that is to say, segregated in attendance and operation on the basis of the racial identity or affiliation of students legally attending said schools, is a denial to Plaintiffs of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States and is, therefore, unconstitutional and void, and, further, is in violation of the rights of Plaintiffs under the Constitution of the State of North Carolina and is, therefore, unconstitutional and void;

(3) That the Court enter a judgment or decree declaring that the policy, custom and practice of Defendant in requiring minor Plaintiff Joseph Hiram Holt, Jr., to attend J. W. Ligon Junior-Senior High School and denying to said minor Plaintiff admission to the Needham Broughton Senior High School, all on account of said minor Plaintiff's race or color, is a denial of equal protection of the laws guaranteed to said minor Plaintiff and to adult Plaintiffs by the Fourteenth Amendment to the Constitution of the United States and is, therefore, unconstitutional and void, and, further, is in violation of the rights of Plaintiffs under the Constitution of the State of North Carolina and is, therefore, unconstitutional and void;

(4) That the Court issue a permanent injunction forever restraining and enjoining Defendant from maintaining and operating public schools and a system of public schools in and for the City of Raleigh upon a racially segregated basis;

(5) That the Court issue a mandatory injunction requiring Defendant forthwith to admit minor Plaintiff Joseph Hiram Holt, Jr., to the Needham Broughton Senior

High School, in the City of Raleigh, without regard to his race or color and upon the same basis, aside from race or color, as other children of legal school age living and residing in the area of said school are admitted; that the Court issue a permanent injunction forever restraining and enjoining Defendant from denying minor Plaintiff Joseph Hiram Holt, Jr., admission to the said Needham Broughton Senior High School solely and wholly on account of the race or color of said minor Plaintiff; and

(6) That the Court allow Plaintiffs their costs in this action and grant and give unto Plaintiffs such other and further relief as to the Court may appear just and proper in the premises.

/s/ Taylor & Mitchell
TAYLOR & MITCHELL
125 East Hargett Street
Raleigh, North Carolina
Attorneys for Plaintiffs

NORTH CAROLINA
WAKE COUNTY

VERIFICATION

JOSEPH HIRAM HOLT, being first duly sworn, deposes and says: that he is one of the Plaintiffs in the foregoing Complaint; that he has read and knows the contents thereof; that the things stated therein are true of his own knowledge, except those things alleged and stated upon information and belief, and as to those things he believes it to be true.

.....
Affiant

Subscribed and sworn to before me
this 27th day of August, 1957
My commission expires: 9-11-59

/s/ Agnes K. Parker
Notary Public

APPENDIX J

UNITED STATES DISTRICT COURT

EASTERN DISTRICT, NORTH CAROLINA

Raleigh Division

Civil Action #1064

JOSEPH HIRAM HOLT, JR., a Minor, by His Next Friend, JOSEPH HIRAM HOLT, and JOSEPH HIRAM HOLT and ELWYNA HOLT,

Plaintiffs,

—v.—

THE RALEIGH CITY BOARD OF EDUCATION, a Body Corporate,

Defendant.

ANSWER

The defendant, answering the Complaint, says:

First Defense

As previously asserted in the Motion to Dismiss, defendant reiterates the Complaint fails to state a claim upon which relief can be granted.

Second Defense

The Court lacks jurisdiction over the subject matter of the action.

Third Defense

There is a misjoinder of parties plaintiff.

Fourth Defense

There is a misjoinder of causes.

Fifth Defense

The plaintiffs having prayed for equitable relief have failed to show the failure of defendant to perform a clear legal duty so as to provide grounds for relief and basis for an effective decree in equity. The allegations of the Complaint neither reflect a specific order, regulation, rule or conduct of the defendant nor allege facts showing that specific statutory duty has been done by the defendant in a manner which is discriminatory towards the minor plaintiff or is unreasonable. Defendant further alleges that the allegations of the Complaint fail to show that minor plaintiff's admission to the school requested would be in harmony with the State law relating to the assignment of pupils to public schools. Only a general course of conduct with a claimed result is alleged in the Complaint. The action should be dismissed for that the District Court should not be placed in the position of being a supervisory school board in the administration of State law, rule and regulation.

Sixth Defense

This action should be dismissed or stayed on the ground that the allegations of the Complaint and the relief prayed for require this Court to pass upon issues which are purely factual in nature, to wit: the existence of rules, regulations, customs and usages and other questions of fact, the existence of which must be determined before any constitutional issue is presented under the Constitution of the United States and which if found non-existent, will obviate the necessity of intervention of federal Courts of the United States.

Seventh Defense

This action should be dismissed or stayed on the grounds that the allegations of the complaint and the relief prayed for require this Court to construe North Carolina law, namely: to pass upon the meaning, construction and application of North Carolina law relating to the assignment of pupils by the defendant and to pass upon the meaning, construction, application and necessity of and for certain rules and regulations of the defendant, all of which must properly and with propriety be determined in the Courts of the State of North Carolina, prior to any consideration of the construction, meaning, and application thereof by the Federal Courts of the United States, and this Court should decline to take jurisdiction rather than interfere with a State administrative agency in matters which properly under Constitutional principles and applicable law should be matters of State Court consideration and determination.

Eighth Defense

Under the facts sought to be alleged or to be inferred from the allegations of the Complaint this Court lacks jurisdiction by reason also of the absence of a Federal question and further by reason of the fact that there is no justiciable controversy between these parties as required by Section 2201 of the Judicial Code (28 U. S. C. A. 2201).

Ninth Defense

This action should be dismissed or stayed for the further reasons that plaintiffs and each of them have an adequate remedy or remedies at law under the Constitution and laws of North Carolina, including, but not limited to, the so-called Pupil Assignment Act (Chapter 115, General Statutes of North Carolina, Section 176 through 179 inclusive) which said remedy or remedies have not been resorted to

or exhausted. Federal intervention, for the purpose of affording the extraordinary relief here sought, would deny and reject the scrupulous regard with Federal Courts properly should have for the rightful independence of State agencies and judicial bodies.

Tenth Defense

Answering the allegations of the Complaint the defendant says:

1. The allegations of paragraph 1 and each subparagraph are denied.

2. The allegations of paragraph 2 are denied.

3. Answering the allegations of paragraph 3, the defendant does not deny that plaintiffs are members of the Negro race, that they are presently domiciled in the City of Raleigh, Wake County, North Carolina, that minor plaintiff is within eligible school age limits and is a party to this proceeding through his next friend. Defendant does not have sufficient knowledge or information to form a belief as to the remaining allegations of said paragraph and except as herein admitted, all allegations of paragraph 3 are denied.

4. Paragraph 4 of the complaint states certain conclusions of law to which no answer is required. Any allegation of fact or inference thereof contained in said paragraph is denied.

5. Paragraph 5 of the complaint states certain conclusions of law to which no answer is required. Defendant admits, however, that the constitutional and statutory provisions referred to in said paragraph are in existence and speak for themselves and have only such meaning and con-

struction as may be attributed to them by the Courts of North Carolina, which are solely responsible for interpretation thereof and any interpretation, construction, implication, inference or meaning sought to be attributed to said constitutional and statutory provisions by the complaint herein favorable to any cause or causes purported to be asserted on behalf of plaintiffs are herewith rejected and denied.

6. Paragraph 6 of the complaint states certain conclusions of law to which no answer is required. Any interpretation, construction, implication, inference or meaning sought to be attributed favorably to any cause or causes attempted to be asserted on behalf of plaintiffs are herewith rejected and denied.

7. Paragraph 7 of the complaint states certain conclusions of law to which no answer is required. Any interpretation, construction, implication, inference or meaning sought to be attributed favorably to any cause or causes attempted to be asserted on behalf of plaintiffs are herewith rejected and denied.

8. Answering the allegations of paragraph 8, the defendant says that in pursuance of a duty imposed by law the defendant is performing an administrative function in connection with the maintenance of a public school system in the City of Raleigh, North Carolina, which said school system is supported by public funds. Defendant further avers that any action taken by it as regards said public school system is under sanction of law and it is denied specifically that said school system is maintained and operated other than pursuant to law and constitutional provision. Except as herein admitted all allegations of paragraph 8 are denied.

9. Answering the allegations of paragraph 9, this defendant says that in the system of public schools maintained in the City of Raleigh, North Carolina there are two standard and accredited high schools, namely, Needham-Broughton Senior High School and J. W. Ligon Junior-Senior High School, and that said schools are of modern construction and are excellently staffed. It is specifically denied that the operation and maintenance of said two standard and accredited high schools has not always been pursuant to law and constitutional provision. Except as herein admitted the allegations of paragraph 9 are denied.

10. The allegations of paragraph 10 are denied.

11. The allegations of paragraph 11 are denied.

12. The allegations of paragraph 12 are denied and the defendant gives notice that it will hold plaintiffs to strict proof of any allegations of said paragraph.

13. The allegations of paragraph 13 are denied.

14. The allegations of paragraph 14 are denied.

15. The allegations of paragraph 15 are denied.

WHEREFORE, having fully answered, defendant prays and moves the Court:

1. That this action be dismissed by reason of the matters and things set forth in the first defense.

2. That this action be dismissed by reason of the matters and things set forth in the second defense.

3. That this action be dismissed by reason of the matters and things set forth in the third defense.

4. That this action be dismissed by reason of the matters and things set forth in the fourth defense.

5. That this action be dismissed by reason of the matters and things set forth in the fifth defense.

6. That this action be dismissed or stayed by reason of the matters and things set forth in the sixth defense.

7. That this action be dismissed or stayed by reason of the matters and things set forth in the seventh defense.

8. That this action be dismissed by reason of the matters and things set forth in the eighth defense.

9. That this action be dismissed or stayed by reason of the matters and things set forth in the ninth defense.

10. That this action be dismissed by reason of the matters and things set forth in the tenth defense.

11. That the defendant under the rules demands a trial by jury in this action.

12. That the plaintiffs be denied any and all relief prayed for in the Complaint.

13. That judgment be entered herein in favor of defendant and against the plaintiffs.

14. That the defendant recover its costs to be taxed against the plaintiffs, and

15. That defendant have such other and further relief which the Court may deem just and proper.

/s/ J. C. B. Ehringhaus, Jr.

/s/ Thomas F. Ellis
Attorneys for Defendant

Of Counsel

Ehringhaus and Ellis
1004 Raleigh Building
Raleigh, North Carolina

I certify that a copy of the foregoing Answer has this date been deposited in the U. S. mail addressed to Messrs. Taylor & Mitchell, of counsel for plaintiffs in this cause, Attorneys at Law; 125 E. Hargett Street, Raleigh, N. C. This October 21, 1957.

Of Counsel for Defendant

FILE COPY

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JAMES R. BROWNING, Clerk

Supreme Court of The United States

October Term, 1958

No. 114

JOSEPH HIRAM HOLT, JR., A MINOR
BY HIS NEXT FRIEND,
JOSEPH HIRAM HOLT, and ELWYNA HOLT,

Petitioners,

vs.

THE RALEIGH CITY BOARD OF EDUCATION,
A BODY CORPORATE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

BRIEF OF THE ATTORNEY GENERAL OF NORTH CAROLINA AMICUS CURIAE

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Amicus Curiae

INDEX

Interest of the State of North Carolina 1

Opinion Below 3

Jurisdiction 3

Questions Presented 3

Statement of the Case 4

Summary of Argument 5

Argument:

I North Carolina recognizes that the decisions of the Supreme Court of the United States are the supreme law of the land, and neither the State nor its subdivisions of government have taken any positions contrary to the decisions of this Court 7

II Except for exhaustion of administrative remedy the questions now presented by Petitioners were never passed on by the lower federal courts 11

III Petitioners did not exhaust the administrative remedy provided by the State 14

IV The interpretation of a local state statute by a federal district court, which is approved by a circuit court of appeals, is ordinarily accepted by this Court 19

Conclusion 21

TABLE OF CASES

Abelleria v. District Court of Appeal, 109 P. 2d 942 18

Adkins v. School Board of Newport News, 148 F. Supp. 430; affirmed 246 F. 2d 325 15

Aircraft & D. Equipment Corp. v. Hirsch, 331 U. S. 752, 91 L. ed. 1796 18

Akron, C & Y. R. Co. v. United States, 67 L. ed. 605 19

Alabama Power Co. v. Federal Power Commission, 128 F. 2d 280; 296 17

Andree & Seedman v. Administrator of W. & H. Division, etc., 122 F. 2d 634, 637 17

Baker v. Schofield, 243 U. S. 114, 61 L. ed. 626, 630 11

Beauharnais v. Illinois, 343 U. S. 250, 96 L. ed. 919 13

Bowles v. Baer, 7 Cir., 142 F. 2d 787, 789 ..... 17, 18

Brown v. Board of Education of Topeka, 347 U. S. 483, 98 L. ed. 873; 349 U. S. 294, 99 L. ed. 653 6

Byrd v. Blue Ridge Rural Elec. Coop., 356 U. S. 525, 2 L. ed. 2d 953 20

Carson v. Board of Education of McDowell County, 227 F. 2d 789, 790 13

Carson v. Warlick, 238 F. 2d 724, cert den. 353 U. S. 910, 1 L. ed. 2d 664 ..... 12, 13, 14, 21

Constantian v. Anson County, 244 N. C. 221, 93 S. E. 2d 163 9

Ellis v. Dixon, 349 U. S. 458, 99 L. ed. 1231, 1234 13

Ex Parte Bridges, 49 F. Supp. 292, 306 18

Feeney v. Willard, 129 F. Supp. 414, 417 17

Fresh-Grown Preserve Corp. v. Federal Trade Commission, 125 F. 2d 917, 919 17

Gibson v. Board of Public Instruction, 246 F. 2d 913 15

Glasser v. United States, 315 U. S. 60, 86 L. ed. 680 17

Graber Tank & Mfg. Co. v. Linde Air Products Co., 336 U. S. 271, 93 L. ed. 672 11

Holland v. Board of Instruction of Palm Beach County, 258 F. 2d 730 15

Hood v. Board of Trustees of Sumter County School Dist., 232 F. 2d 627, cert. den. 352 U. S. 870, 1 L. ed. 2d 76 13

Holt v. Raleigh City Board of Education, 164 F. Supp. 853, 856; 265 F. 2d 95, 98 ..... 3, 4, 12

Kelly v. Board of Instruction of the City of Nashville, 159 F. Supp. 272 15

Morgan v. United States, 298 U. S. 468, 80 L. ed. 1288 17
National Lawyers' Guild v. Brownell, 96 U. S. 252, 225 F. 2d 552, 555 17
N. L. R. B. v. Washington Dehydrated Food Co., 118 F. 2d 980, 997 17
Orleans Parish School Board v. Bush, 242 F. 2d 156, 164 13
Palmer v. Hoffman, 318 U. S. 109, 87 L. ed. 645 20
Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256 16
Powhatan Mining Co., v. Ickes, 118 F. 2d 105, 109 18
Ragan v. Merchants Transfer & Warehouse Co., 337 U. S. 530, 534, 93 L. ed. 1520, 1523, 69 S. Ct. 1233 20
Rase v. United States, 129 F. 2d 204, 210 17
School Board of the City of Charlottesville, Virginia, v. Allen, 240 F. 2d 59, 64 ..... 13, 15
Sherman v. United States, 356 U. S. 369, 2 L. ed. 2d 848 13
Shields v. Utah, Idaho Central R. Co., 305 U. S. 177, 83 L. ed. 111 17
Shuttlesworth v. Birmingham Board of Education, 162 F. Supp. 372, ____ U. S. ____, 3 L. ed. 2d 145 14
Simms v. Greene, 161 F. 2d 87, 89 18
Steele v. General Mills, 329 U. S. 433, 91 L. ed. 402 20
Steele v. United States, 133 F. 2d 1015, 1022 18
Ullman v. United States, 350 U. S. 422, 100 L. ed. 511 13
United States v. Dillman, 146 F. 2d 572 17
United States Ex Rel Eng Fon Sing v. Reimer, 40 F. Supp. 602, 604 18
United States v. Fleischman, 339 U. S. 349, 94 L. ed. 906, 916 13
United States v. Hayman, 342 U. S. 205, 219, 220; 96 L. ed. 232 18
Walters v. St. Louis, 347 U. S. 231, 98 L. ed. 660 13
Williams Mfg. Co. v. United Shoe Mach. Corp., 316 U. S. 364, 86 L. ed. 1537 11

STATUTES

Article 21, Chapter 115, General Statutes of North Carolina 1, 3
General Statutes of North Carolina 115-178 16
28 USCA 1254(1) 3
28 USCA 2101(c) 3
28 USCA 1331 4
28 USCA 1343(3) 4
28 USCA 2201 4

ARTICLES CITED

Dan J. Meador: "The Constitution and the Assignment of Pupils to Public Schools" 22
Hon. William P. Rogers 9, 10

MISCELLANEOUS

42 Am. Jur. p. 496, sec. 150 19
73 C. J. S. p. 356, sec. 41, sec. 124, p. 444 (Note 58) 18, 19
Constitution of North Carolina, Art. I, sec. 3, sec. 5 9
Constitution of United States, Art. VI 9
Rule 42, Revised Rules of the Supreme Court of the United States 1

Supreme Court of The United States

October Term, 1958

No. 999

JOSEPH HIRAM HOLT, JR., A MINOR
BY HIS NEXT FRIEND,
JOSEPH HIRAM HOLT, and ELWYNA HOLT,
Petitioners,

vs.

THE RALEIGH CITY BOARD OF EDUCATION,
A BODY CORPORATE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE ATTORNEY GENERAL OF NORTH CAROLINA AMICUS CURIAE

INTEREST OF THE STATE OF NORTH CAROLINA

The State of North Carolina, through its Attorney General, files this brief as amicus curiae pursuant to the provisions of Rule 42, Paragraphs four and five, of the Revised Rules of the Supreme Court of the United States.

The primary issue in this case revolves around the correct construction or interpretation of the Assignment and Enrollment of Pupils Act of the State of North Carolina (Article 21 of Chapter 115 of the General Statutes—Cumulative Supplement of 1957). The statutes which constitute this Article appear as Petitioners' Appendix G on p. 68. The Attorney

General of North Carolina appeared as amicus curiae for the State when this case was tried in the Federal District Court and also filed a brief and argued the case when it was heard before the United States Court of Appeals for the Fourth Circuit. The State of North Carolina, therefore, is highly interested in this case because it involves an interpretation of the substantive and procedural provisions of the above-cited Article which are in force and have State-wide application. The Attorney General of North Carolina believes that the District Court of the United States and the United States Court of Appeals for the Fourth Circuit have both construed, interpreted and applied this article in a proper manner and in accordance with the previous decisions of the United States Court of Appeals for the Fourth Circuit as well as the Supreme Court of North Carolina.

The State is highly interested in a proper construction of this Article, believes that the Federal Courts have properly construed the Article and hopes that the question is now set at rest so that the proper assignment of pupils to the public schools of all races in North Carolina may now be administered and carried out without so much litigation.

The State of North Carolina is further interested in this case for the reason that it is believed that the statutes which compose the Article in question, and as interpreted by the two Federal Courts, can be administered so as to permit an unhurried but effective translation into action of the principles announced by this Court in the *Brown* decision.

The State of North Carolina is further interested in the result of this case for the simple reason that it represents a renewed attack on this Article, and one of the successive and apparent never ending steps on the part of Counsel for the Petitioners to seek to place the entire operation of the public school system of the State in the hands of the Federal Courts for administrative purposes.

Last of all, the interest of the State of North Carolina is

plain and clear. The Assignment and Enrollment of Pupils Act contains and expresses a State-wide policy on this subject. It is vital that this policy as construed and set forth by the two Federal Courts shall continue to prevail and that the State shall be allowed within reasonable constitutional limits to choose its own method of bringing about a solution of the problem with which the State is now faced.

OPINION BELOW

The Opinion of the United States District Court for the Eastern District of North Carolina is reported as 164 F. Supp. 853 and also appears as Appendix D, p. 32 of the Petition of Petitioners. The Opinion of the United States Court of Appeals for the Fourth Circuit is reported as 265 F. 2d 95 and appears in the Appendix of the Petition as Appendix B, p. 22. The decree of the District Court appears as Appendix C, p. 30 of the Petitioners' Petition, and the decree of the United States Court of Appeals for the Fourth Circuit is attached to the Petition of Petitioners and appears as Appendix A, p. 21. Since these matters are all set forth in the appendixes of the Petitioners we do not think it is necessary to again duplicate these decrees and opinions.

JURISDICTION

The jurisdiction of this Court is invoked by Petitioners pursuant to 28 USCA 1254(1) and 28 USCA 2101(c).

QUESTIONS PRESENTED

There is only one real question presented in this case, and our version of the question is as follows:

Did the District Court of the United States for the Eastern District of North Carolina and the United States Court of Appeals for the Fourth Circuit correctly construe, interpret and apply Article 21 of Chapter 115 of the General Statutes of North Carolina—Cumulative Supplement of 1957—to the facts in this case?

We are aware of the fact that Counsel for the Petitioners have renewed their attack on the Assignment and Enrollment of Pupils Article by attempting to say at this juncture that this Assignment and Enrollment Article places an unconstitutional burden on Petitioners. We will show later on in our Argument that this presentation of the question is entirely invalid and improper.

Counsel for the Petitioners undertake to present a question formulated on the theory that the doctrine of exhaustion of administrative remedies should not have been applied at all in this case. We will show in our Argument that this question was never presented and is now improperly presented in this Petition.

Counsel for Petitioners also attempt to present a question based upon an assumption that Petitioners were either denied the right to counsel or that right to counsel was abridged, and this resulted in a denial of Petitioners' constitutional rights. As we will show later on, no such situation ever existed.

In presenting their questions in this Petition Counsel for Petitioners have utterly ignored the theory on which this case was tried in the District Court.

STATEMENT OF THE CASE

This cause was heard by the District Court on July 14 and 15, 1958. Petitioners' jurisdictional statements were based upon 28 USCA 1331, 28 USCA 1343(3) and 28 USCA 2201. The adult Petitioners sought to have the minor Petitioner, Joseph Hiram Holt, Jr., admitted to Needham Broughton Senior High School, in Raleigh, North Carolina. The facts are well stated and clearly bring everything into view in the complete and full Findings of Fact made by the District Judge, and these Findings appear in his Opinion (HOLT v. RALEIGH CITY BOARD OF EDUCATION, 164 F. Supp. 853, 856). Briefly, the Petitioners in their pleading allege their citizenship, residence and eligibility of the minor Peti-

tioner to attend the Raleigh City Schools operated by the Raleigh City Board of Education; while Petitioners allege that the schools are operated on a segregated basis and that all schools in Raleigh are operated in violation of Petitioners' constitutional rights, yet this matter was not pressed before the District Judge as to the schools in general, and the case was clearly tried on the theory of whether or not the Petitioners had properly exhausted the administrative remedy provided by the Assignment and Enrollment of Pupils Article of the North Carolina State Laws. The chief allegation was that the minor Petitioner lived closer to the Needham Broughton Senior High School than he did to Ligon School where he was assigned. The Court will see from the Findings of Fact (see Finding of Fact No. 6) that the minor Petitioner also alleged in his application that Needham Broughton Senior High School would give him a fuller academic and extra-curricular program.

After a Motion to Dismiss had been overruled, the Respondent School Board filed an Answer, which appears in the Record, and because of the State-wide policy involved in the statutes the Attorney General of North Carolina filed a Brief Amicus Curiae in the District Court and participated in the argument on the question only of the proper interpretation of the Pupil Assignment and Enrollment Article. The Attorney General did not engage in any contest on the merits of the case except as to any facts that pertain to the administrative remedy. Actually the Court will see from the Record no attack was made by the Petitioners below on the constitutionality of the State Statute, and the only complaint of the Petitioners was as to the administration of the Statute.

SUMMARY OF ARGUMENT

The Attorney General, in summarizing his Argument, would emphasize the following:

(a) The State of North Carolina has never defied or placed itself in a state of resistance to the principles established and

decided by this Court in the case of BROWN v. BOARD OF EDUCATION OF TOPEKA, 347 U. S. 483, 98 L. ed. 873; 349 U. S. 294, 99 L. ed. 653. This has been clearly demonstrated by pronouncements of the Supreme Court of North Carolina, statements in the Report of the North Carolina Advisory Committee on Education and by pronouncements of State public officials.

(b) Colored students have already been admitted to schools previously considered as white schools in the cities of Goldsboro, Greensboro, Winston-Salem and Charlotte. At the time of the writing of this Brief action has been taken in Greensboro to consolidate two schools which will further result in the admission of colored children to a school theretofore considered as a white school.

(c) The Assignment and Enrollment of Pupils Article of this State has already been declared to be constitutional on its face by the United States Court of Appeals for the Fourth Circuit, and Petition for Certiorari to review this decision was denied by this Court. It is not denied, of course, that the Assignment and Enrollment of Pupils Article can be applied and administered in an unconstitutional manner but this problem is not presented in this case.

(d) Putting to one side the question of the exhaustion of State administrative remedies, the questions presented by Counsel for Petitioners in this Petition for Certiorari were not passed on by either the District Court or the Court of Appeals for the Fourth Circuit.

(e) The Petitioners' contention that the State administrative remedy, as set forth in the Assignment and Enrollment of Pupils Article, has been applied in such a fashion as to penalize the Petitioners or has been applied in such manner as to constitute an unconstitutional burden was not passed upon by either the District Court or the Court of Appeals for the Fourth Circuit, and such question was not raised by the Petitioners in their pleadings.

(f) The right of Petitioners to counsel and the right to a hearing before any State administrative agency has never been unconstitutionally denied or abridged.

(g) The Petitioners did not properly exhaust the State's administrative remedy, and the two lower Federal Courts have correctly construed the State Statute.

ARGUMENT

I

NORTH CAROLINA RECOGNIZES THAT THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES ARE THE SUPREME LAW OF THE LAND, AND NEITHER THE STATE NOR ITS SUBDIVISIONS OF GOVERNMENT HAVE TAKEN ANY POSITIONS CONTRARY TO THE DECISIONS OF THIS COURT.

As a separate and distinct matter and before we enter into our general argument we strongly emphasize before this Court the fact that Counsel for the Petitioners have never been interested in the minor Petitioner as an individual and that their interest has only extended as far as the minor Petitioner could be useful to them in maintaining an action in which they could seek an advisory opinion from this Court. We will now explain to this Court why we make this statement. *If the Court will examine the judgment, or decree, entered by the United States District Judge for the Middle District of North Carolina in this action (see Petitioners' Appendix C, p. 30 of Petition) the Court will find that the District Judge as a part of the judgment, or decree, ordered the following:*

"3. The Plaintiffs are not entitled to the relief prayed for.

"A judgment will be entered in conformity with this opinion unless the plaintiffs file a written motion within ten days requesting that the case be retained on the docket for the purpose of giving them an opportunity to adequately exhaust their administrative remedies."

In other words, had Counsel for the Petitioners desired to do so and had they had the interest of the minor Petitioner at heart, they could have by a simple motion requested that this case be retained on the docket until they had taken the necessary steps to correctly and properly exhaust the administrative remedy. We are warranted, therefore, in making the statement that Counsel for Petitioners simply wanted to have a lawsuit and were more interested in an advisory opinion than in the welfare of the minor Petitioner. We also call the Court's attention to the fact that the Court will search the evidence in vain for any expression on the part of the minor Petitioner, who testified in the case, that he ever actually wanted to go to Needham Broughton Senior High School, or, in other words, that it was his own heart's desire to attend that school.

We have already called the Court's attention to the fact that in this State colored students have been admitted to schools which were previously called or denominated "white" schools in several cities of the State and that the process is now going on in a careful and deliberate manner. No doubt the action of the State is too slow for many of our citizens and too fast or entirely contrary to the views of many other citizens of the State. What we really want this Court to consider is the fact that we are through the machinery of the Assignment and Enrollment of Pupils Article making progress in compliance, and there is some ground to believe that if we are allowed to continue we may arrive at a practical and workable solution to the cause. Perhaps the only thing that will defeat this is the continuous and harassing litigation fostered by organizations outside the State. We would not be frank with the Court if we did not say that the vast majority of the citizens of the State are not in agreement with the principles announced in the *Brown* case but the sober and conscientious people in the State, as well as the State's public officials, have decided to work out the problem, if possible, in accordance with the principles of the Federal Constitution as construed by this Court.

It would take too long to give all of the illustrations of this

attitude but it is sufficient to call the attention of this Court to the case of CONSTANTIAN v. ANSON COUNTY, 244 N. C. 221, 93 S. E. 2d 163, in which the Supreme Court of North Carolina decided that the provision in the State Constitution which established segregated schools as between the white and colored races was invalid and no longer effective in view of the decision of this Court in the Brown case. The Supreme Court of North Carolina in the above-cited case said:

> "Our deep conviction is that the interpretation now placed on the Fourteenth Amendment, in relation to the right of a state to determine whether children of different races are to be taught in the same or separate public schools, cannot be reconciled with the intent of the framers and ratifiers of the Fourteenth Amendment, the actions of the Congress of the United States and of state legislatures, or the long and consistent judicial interpretation of the Fourteenth Amendment. However that may be, the Constitution of the United States takes precedence over the Constitution of North Carolina. Constitution of North Carolina, Article I, section 3 and 5; Constitution of the United States; Article VI. In the interpretation of the Constitution of the United States, the Supreme Court of the United States is the final arbiter. Its decision in the Brown Case is the law of the land and will remain so unless reversed or altered by constitutional means. Recognizing fully that its decision is authoritative in this jurisdiction, any provision of the Constitution or statutes of North Carolina in conflict therewith must be deemed invalid."

It should be noted that the Honorable William P. Rogers, Attorney General of the United States, quoted excerpts from the above quotation in his address delivered before the Thirteenth Annual Meeting of the National Conference on Citizenship, held at the Statler-Hilton Hotel, in Washington, D. C., on September 17, 1958 (See Department of Justice's release to morning papers, Thursday, September 18, 1958).

The North Carolina Advisory Committee on Education in its Report to the people of the State likewise stated that the decision was unprecedented and a reversal of established law, but the Committee also said the following:

> "The decision of the Supreme Court of the United States, however much we dislike it, is the declared law and is binding upon us, ****We must live and act now under the decision of that Court. We should not delude ourselves about that. ****The Supreme Court has declared that the principle upon which our system was built, and upon which it has rested, is no longer valid. So, we do not have the problem of 'preserving our school system.' The Supreme Court of the United States destroyed the school system which we had developed - - a segregated-by-law system. Our problem is, rather, to build a new system out of the Supreme Court's wreckage of the old. This fact governs our whole approach to the problem."

The North Carolina Advisory Committee on Education in its recommendation No. 2, made to the people of the State and to the Governor and General Assembly, said:

> "Specifically, we recommend that all school units: 2. Recognize that since the Supreme Court decision there can be no valid law compelling the separation of the races in the public schools."

It should also be pointed out that the Honorable William P. Rogers, Attorney General of the United States, in his speech before the California State Bar Convention, delivered on Wednesday, October 8, 1958, quotes, with approval, from a speech of the Attorney General of North Carolina, as follows:

> "It is encouraging that responsible voices are beginning to be heard with more frequency. Ministers, school boards, parent-teacher associations, students, and some state officials are speaking out courageously and realistically. For example, the Attorney General of North Carolina said last week:
>
> "'Those states which seek to evade have been and will continue to be unsuccessful, and, to those states, there are but two avenues which remain open - - an obedience to the law, or avoidance of the law. To avoid the law, the state merely goes out of the business of public education. That day should never come to North Carolina.'"

Our only chance and our only hope is for this Court to up-

hold and support us in our Assignment and Enrollment of Pupils Article so long as our local officials give objective and impartial administration in carrying out these statutes.

There are no laws whatsoever on the statute books of North Carolina that require segregation of pupils in the public school system, and, in fact, the Public School Laws of the State do not mention race or color. We believe, therefore, that the rulings of the United States Court of Appeals for the Fourth Circuit, which have heretofore been rendered, represent a sane and balanced view on an attempted solution of this problem and that these decisions should be upheld, and, if so, then this Court will have assisted us in saving our schools by staying within approved constitutional limitations.

II

EXCEPT FOR EXHAUSTION OF ADMINISTRATIVE REMEDY THE QUESTIONS NOW PRESENTED BY PETITIONERS WERE NEVER PASSED ON BY THE LOWER FEDERAL COURTS.

If this Court will examine the Record it will see that nearly all of the primary or ultimate facts are embraced in a stipulation signed by Counsel for the parties concerned, with perhaps some few additional facts found by the District Court from the record in evidence apart from the stipulations. So far as we can recall there are no serious exceptions to the Findings of Fact, and these Findings having been concurred in by the Circuit Court of Appeals for the Fourth Circuit it would appear that they are adequate to dispose of the case, and since these Findings now have the status of concurrent findings by two Federal Courts under the so-called "Two-Court Rule", this Court would not disturb such findings except for some extraordinary reason (BAKER v. SCHOFIELD, 243 U. S. 114, 61 L. ed. 626, 630; WILLIAMS MFG. CO. v. UNITED SHOE MACH. CORP., 316 U. S. 364, 86 L. ed. 1537; GRABER TANK & MFG. CO v. LINDE AIR PRODUCTS CO., 336 U. S. 271, 93 L. ed. 672).

The court below did not pass on any question relating to

the North Carolina Assignment Article as an unconstitutional, burdensome, procedural discrimination, nor did the court below pass on the question as to whether the North Carolina law as formulated and applied imposed an unconstitutional penalty and burden upon Petitioners. If the Court will examine the Opinion of the District Judge (HOLT v. RALEIGH CITY BOARD OF EDUCATION, 164 F. Supp. 853) it will be seen that the question of exhaustion of the administrative remedy, according to the interpretation of the North Carolina statutes, is the primary thing considered by the District Court, and the Court having decided that the remedy was not properly exhausted did not reach the question as to whether the reassignment was refused on account of race. That this is particularly true and is the view of the Circuit Court of Appeals for the Fourth Circuit this Court will see that the Circuit Court of Appeals in this connection said (HOLT v. RALEIGH CITY BOARD OF EDUCATION, 265 F. 2d 95, 98):

> "With these and other pertinent considerations in mind the District Judge might not have felt obliged to dismiss the complaint if he had reached the merits of the case, but he was restricted in the scope of his decision by the failure of the plaintiffs to do their part in giving effect to the plan of the statute. In so doing, he was acting in accordance with the rule approved by this court that persons aggrieved by the actions of the school officials of a State may not appeal for relief to the Federal courts until they have exhausted the remedies afforded them by the statutes of the State."

If this Court will examine the pleadings, and especially the Complaint of the Petitioners, it will be seen that they have never really attacked the constitutionality of the Assignment and Enrollment of Pupils Article; that is, they did not renew their attack, for these same attorneys tried to have this Act declared unconstitutional in the case of CARSON v. WARLICK, 238 F. 2d 724, cert. den. 353 U. S. 910, 1 L. ed. 2d 664. The statute passed upon by the Fourth Circuit in CARSON v. WARLICK, supra, was subsequently amended but the only changes made were: the words "assignment" and "as-

sign" are now used instead of "enrollment" and "enroll", and it was made definite in the statute as to the number of days' notice that should be given for an appeal; in other words, the only thing accomplished by the amendment was clarification and more definite procedural standards for the benefit of applicants and petitioners. The case of CARSON v. WARLICK, supra, and the principles therein set forth have been approved in several cases: ORLEANS PARISH SCHOOL BOARD v. BUSH, 242 F. 2d 156, 164--Fifth Circuit; SCHOOL BOARD OF THE CITY OF CHARLOTTESVILLE, VIRGINIA, v. ALLEN, 240 F. 2d 59, 64--Fourth Circuit; HOOD v. BOARD OF TRUSTEES OF SUMTER COUNTY SCHOOL DISTRICT, 232 F. 2d 627, cert. den. 352 U. S. 870, 1 L. ed. 2d 76.

It is strange that Counsel for Petitioners would contend that because they are required to exhaust an administrative remedy that this is an unconstitutional deprivation of rights. To be sure, the requirement of exhaustion of an administrative remedy requires some extra burden, but the rule is well established, and no reason can legally exist which should make Petitioners an exception to the rule. The cases decided by this Court on the subject are listed by the Circuit Court of Appeals for the Fourth Circuit in the case of CARSON v. BOARD OF EDUCATION OF McDOWELL COUNTY, 227 F. 2d 789, 790.

We have not touched upon all of these questions but the Court will observe that they were not passed upon by the two lower Federal Courts, and this being true, the well-known rule should be applied that this Court will not consider or pass upon things, positions or contentions which were not considered and passed upon below (WALTERS v. ST. LOUIS, 347 U. S. 231, 98 L. ed. 660; BEAUHARNAIS v. ILLINOIS, 343 U. S. 250, 96 L. ed. 919; SHERMAN v. UNITED STATES, 356 U. S. 369, 2 L. ed. 2d 848; UNITED STATES v. FLEISCHMAN, 339 U. S. 349, 94 L. ed. 906, 916--last paragraph of opinion; ELLIS v. DIXON, 349 U. S. 458, 99 L. ed. 1231, 1234; ULLMAN v. UNITED STATES, 350 U. S. 422, 100 L. ed. 511 --head notes 24, 25).

The contention that the North Carolina Assignment and Enrollment Article confers unwarranted investigatory powers upon the School Board is untenable for the reasons given by the Circuit Court of Appeals for the Fourth Circuit in this case.

III

PETITIONERS DID NOT EXHAUST THE ADMINISTRATIVE REMEDY PROVIDED BY THE STATE

This Court has affirmed the general principles involved in an assignment or placement statute operated or administered in a state public school system (SHUTTLESWORTH v. BIRMINGHAM BOARD OF EDUCATION, 162 F. Supp. 372, motion to affirm granted, ——— U. S. ———, 3 L. ed. 2d 145). As we have previously pointed out this Court also had an opportunity to review the ruling of the Circuit Court of Appeals for the Fourth Circuit in the case of CARSON v. WARLICK, supra, which upheld the constitutionality of the North Carolina Assignment or Placement Statute but this Court declined to review the ruling of the Circuit Court of Apeals. We, of course, recognize that such placement statutes are always open for further consideration on the question of proper and non-discriminatory administration by local or state officials.

The North Carolina Assignment and Enrollment of Pupils Article has been approved by the rulings in other circuits and is not open to the charge that it furnishes an inadequate remedy. We have also pointed out that the court below did not pass on the question that the local school board had adopted a hard and fast policy of segregation, which, of course, it has not, and, as we have pointed out, colored pupils have already been admitted to so-called white schools in the State of North Carolina. Of course, an assignment or enrollment statute is utterly useless if it is to be set aside and rendered entirely ineffective upon bare allegation that the local authorities are determined to follow a policy of segregation. Here it is very easy to show that in all the cases where

such has been the case the local school authorities have clearly shown what they intended to do and Counsel for the Petitioners have always attempted to bring this, as well as their other cases, within the purview of the rulings of those courts who have said that if the administrative remedy is futile it need not be pursued at all (HOLLAND v. BOARD OF PUBLIC INSTRUCTION OF PALM BEACH COUNTY, 258 F. 2d 730-5th Circuit, 1958; KELLY v. BOARD OF INSTRUCTION OF THE CITY OF NASHVILLE, 159 F. Supp. 272, M.D. Tenn., 1958; GIBSON v. BOARD OF PUBLIC INSTRUCTION, 246 F. 2d 913-5th Cir., 1957). To this line of cases we could also add the Virginia cases where the administrative remedy and the placement statute were held to be unconstitutional and totally inadequate (ADKINS v. SCHOOL BOARD OF NEWPORT NEWS, 148 F. Supp. 430; affirmed 246 F. 2d 325-4th Cir.). In the case of GIBSON v. BOARD OF INSTRUCTION, supra, the Board of Public Instruction of Dade County, Florida, had passed a resolution saying: "Until further notice the free school system of Dade County will continue to be operated, maintained and conducted on a non-integrated basis." This Court has always said (SCHOOL BOARD OF THE CITY OF CHARLOTTESVILLE, VIRGINIA v. ALLEN, 240 F. 2d 59-4th Cir., 1956) that where an application, because of a preconceived order, resolution or policy, would always result in a referral to a segregated school, the proceedings would be futile. The case of HOLLAND v. BOARD OF INSTRUCTION OF PALM BEACH COUNTY, supra, is in the same category. It is quite evident that in the Holland case there was a strong feeling that the school districts had been gerrymandered and arranged so as to provide for segregated schools, and the Court of Appeals for the 5th Circuit, therefore, said:

> "In the light of compulsory residential segregation of the races by city ordinance, it is wholly unrealistic to assume that the complete segregation existing in the public schools is either voluntary or the incidental result of valid rules not based on race."

It will be seen, therefore, that the same Fourth Circuit

which held that the Virginia Placement Statute was inadequate and that attempted compliance was futile has also held that the North Carolina Statute is valid and adequate and has adequate and sufficient standards, and needless to say, the Raleigh City School Board well knows that colored pupils who are otherwise eligible to attend schools that have heretofore been designated as white schools must be admitted. To be sure some of the schools in the State are at the present time in the same status as to attendance that existed before the *Brown* decision, and this is easily explained because the whole school system had operated for many decades under the doctrine of PLESSY v. FERGUSON, 163 U. S. 537, 41 L. ed. 256.

The Federal District Court and the United States Court of Appeals for the Fourth Circuit correctly construed the State Statute.

It is clear to us that G. S. 115-178, Cumulative Supplement of 1957, provides for (1) a preliminary application for reassignment made to the Board, which the Board may consider in an *ex parte* manner; at this stage the procedure is in the nature of investigation, and (2) the next stage is that of a hearing which is to be conducted in a *quasi judicial* manner. The fact that plaintiffs did not attend, plus the letter received by the Board from the plaintiffs' attorneys, shows that they intended to sidestep the administrative remedy by means of a mere token compliance. The next step in the administrative exhaustion process is fatal to the position of the plaintiffs. They asked for a hearing in obedience to the language of the statute which says that they may "apply to the Board for a hearing, and shall be entitled to a prompt and fair hearing on the question of reassignment." The statute further says: "A majority of the Board shall be a quorum for the purpose of *holding such hearing* and *passing upon an application for reassignment*****." (Emphasis ours). The statute further says: "The decision of a majority of the members present *at the hearing* shall be the decision of the Board." (Emphasis ours) The next language of the statute clearly shows that the Board is to make findings and how else can findings be made

unless a showing or evidence is produced from which such findings can be made. The statute says: *"If at the hearing the Board shall find****or if the Board shall find****the Board shall render prompt decision upon the hearing."* Every requirement of a formal hearing with evidence produced and findings made is contained in this statute. (Emphasis ours)

The District Court in construing the State Statute relied on MORGAN v. UNITED STATES, 298 U. S. 468, 80 L. ed. 1288, FEENEY v. WILLARD, D. C. S. D. N. Y. 1955, 129 F. Supp. 414, 417, and BOWLES v. BAER, 7 Cir., 1944, 142 F. 2d 787, 789. The Federal District Court also quoted with approval from the case of NATIONAL LAWYERS' GUILD v. BROWNELL, 1955, 96 U. S. App. D. C. 252, 225 F. 2d 552, 555. The Circuit Court of Appeals for the Fourth Circuit upheld this interpretation as supported by these authorities.

The decisions and opinions of both the lower Federal Courts are also supported in their interpretation by certain other cases as follows:

SHIELDS v. UTAH, IDAHO CENTRAL R. CO., 305 U. S. 177, 83 L. ed. 111;

ANDREE & SEEDMAN v. ADMINISTRATOR OF W & H DIVISION, ETC., 122 F. 2d 634, 637;

UNITED STATES v. DILLMAN, 146 F. 2d 572;

GLASSER v. UNITED STATES, 315 U. S. 60, 86 L. ed 680;

N. L. R. B. v. WASHINGTON DEHYDRATED FOOD CO., 118 F. 2d 980, 997;

FRESH-GROWN PRESERVE CORP. v. FEDERAL TRADE COMMISSION, 125 F. 2d 917, 919;

ALABAMA POWER CO. v. FEDERAL POWER COMMISSION, 128 F. 2d 280, 296;

RASE v. UNITED STATES, 129 F. 2d 204, 210;

STEELE v. UNITED STATES, 133 F. 2d 1015, 1022;

UNITED STATES EX REL ENG FON SING v. REIMER, 40 F. Supp. 602, 604;

EX PARTE BRIDGES, 49 F. Supp. 292, 306;

UNITED STATES v. HAYMAN, 342 U. S. 205, 219, 220, 96 L. ed. 232;

POWHATAN MINING CO. v. ICKES, 118 F. 2d 105, 109;

BOWLES v. BAER, 142 F. 2d 787, 789;

SIMMS v. GREENE, 161 F. 2d 87, 89.

In ABELLERIA v. DISTRICT COURT OF APPEALS, THIRD DISTRICT, 109 P. 2d 942, the Supreme Court of California, in commenting on the exhaustion of administrative remedies and the necessity of the completion of these remedies, has the following to say:

> "The question here is whether boards and commissions, charged with the administration of a statute, may carry on their administrative proceedings to completion before being subjected to judicial review. The importance of that issue can hardly be over-estimated, since a curtailment of administrative jurisdiction usually means an enlargement of the duties of the courts in a field in which the courts traditionally are reluctant to enter."

In AIRCRAFT & D. EQUIPMENT CORP. v. HIRSCH, 331 U. S. 752, 91 L. ed. 1796, the Supreme Court of the United States gives the rule, as follows:

> "The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention."

In 73 C. J. S.—Public Administrative Bodies and Procedure—p. 356, sec. 41, the author comments on the review

granted by an administrative agency and the appeal seeking such review, and says:

> "The mere filing of an appeal with the higher administrative agency or officer is not sufficient but the appeal must be fully prosecuted."

In the same volume and the same citation as to Public Administrative Bodies and Procedure, in speaking of the burden of proof the author says in sec. 124:

> "In administrative proceedings, the general rule is that an applicant for relief, benefits, or a privilege has the burden of proof."

The author cites, in Note 58, on p. 444, many cases from both Federal and State jurisdictions to support this statement.

In 42 Am. Jur—Public Administrative Law—p. 496, sec. 150, the author comments on the requirement that evidence is necessary to a hearing and says:

> "The mere holding of a hearing does not justify administrative action required to be based upon a hearing. The decision of the trier of the facts must be reached in accordance with the facts proved, and it must find adequate support in the evidence, formally introduced at the hearing, in all its essential elements."

In AKRON, C. & Y. R. CO. v. UNITED STATES, 67 L. ed. 605, the Supreme Court of the United States defined a full hearing, as follows:

> "A full hearing is one in which ample opportunity is offered to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law of the step asked to be taken."

IV

THE INTERPRETATION OF A LOCAL STATE STATUTE

BY A FEDERAL DISTRICT COURT, WHICH IS APPROVED BY A CIRCUIT COURT OF APPEALS, IS ORDINARILY ACCEPTED BY THIS COURT.

It is quite evident that both lower Federal Courts in construing the Assignment and Enrollment Article of the State of North Carolina have properly construed the statute, and both Courts being in agreement on this phase of the matter the case as to interpretation falls within the rule of this Court as given in the case of BYRD v. BLUE RIDGE RURAL ELEC. COOP., 356 U. S. 525, 2 L. ed. 2d 953, where this Court said:

> "We ordinarily accept the interpretation of local law by the Court of Appeals, cf *Ragan v. Merchants Transfer & Warehouse Co.* 337 U. S. 530, 534, 93 L. ed. 1520, 1523, 69 S. Ct. 1233, and do so readily here since neither party now disputes the interpretation."

It should be emphasized that the statute was construed also by a North Carolina Federal Judge who is familiar with the State Law and who received his training in the schools and courts of the State. We also call the attention of this Court to the holding of this Court in the case of PALMER v. HOFFMAN, 318 U. S. 109, 87 L. ed. 645, where this Court said:

> "Where the lower federal courts are applying local law, we will not set aside their ruling except on a plain showing of error."

In STEELE v. GENERAL MILLS, 329 U. S. 433, 91 L. ed. 402, this Court said:

> "The Circuit Court of Appeals has not disagreed with this holding of the District Court sitting in Texas. Under these circumstances we shall leave undisturbed the interpretation placed upon purely local law by a Texas Federal Judge."

The position of the Petitioners that they were entitled to be represented entirely by their attorney cannot be sustained. There are cases, of course, where the validity of a regulation is the only thing in issue, and the appearance of an attorney

to argue the law is sufficient but this is to be distinguished from those cases where petitioners must satisfy an administrative body that they are entitled to the relief sought in their application.

CONCLUSION

Frankly, we cannot see where the Petitioners have made any case which would warrant this Court in granting a Petition for a Writ of Certiorari, in accordance with Rule 19 of the Revised Rules of the Supreme Court of the United States. Certainly no decision has been made on a constitutional question, that is, a Federal constitutional question, which has not heretofore been determined by this Court, nor has any decision been made by the Court of Appeals which is not in accord with applicable decisions of this Court. Certainly no decision has been rendered by the Circuit Court of Appeals for the Fourth Circuit which is in conflict with decisions of other courts of appeal, nor has any decision been made which is in conflict with applicable State Law. In other words, Petitioners have not brought themselves within the Rule which would warrant a granting of this Writ. If the Court will refer to p. 6 of the Brief filed by the Respondent in CARSON v. WARLICK (No. 748) in this Court in opposition to Petition for Certiorari, it will find where the Respondent has shown that the decision is not in conflict with decisions of the other courts of appeal, and this can still be extended to the decisions that have been made since the Certiorari was denied in that case: No. 748, in which Certiorari was denied, is reported as 353 U. S. 910, 1 L. ed 2d 664.

North Carolina as well as some other States, has adopted the method of assignment and enrollment statutes, or, as they are sometimes called, placement statutes, as a gradual solution to problems now presented in re-establishing and reconstituting the public schools on a new basis and according to a new construction of the Constitution. It is believed that by this means an orderly and gradual solution is possible and that this is a step at least towards a working solution (see:

"The Constitution and the Assignment of Pupils to Public Schools" by Dan J. Meador, Vol. 45, No. 4, Virginia Law Review, 1959). If the administration of these statutes in a large number of cases proves to be discriminatory, then there will always be time enough to strike down action under the statutes, as well as the statutes themselves. We ask the Court to support our statute to the end that we may give it a fair trial.

Respectfully submitted,

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FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted]114

JOSEPH HIRAM HOLT, JR., a Minor by His Next Friend, JOSEPH HIRAM HOLT, and JOSEPH HIRAM HOLT and ELWYNA HOLT, *Petitioners*,

— versus —

THE RALEIGH CITY BOARD OF EDUCATION, a Body Corporate, *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Statement of the Case	1
Argument	3
Conclusion	11

Authorities Cited

Aaron v. *Cooper, et al.*, 358 U.S. 1, 78 S. Ct. 1401, 3 L. ed. 2d 3 7

Briggs v. *Elliott*, 132 F. Supp. 776 6

Brown v. *Board of Education*, 1954, 347 U.S. 483, 74 S. Ct. 686, 98 L. ed. 873; 349 U.S. 294, 75 S. Ct. 743, 99 L. ed. 653 ..... 4, 7, 11

Carson v. *Warlick*, 238 F. 2d 724, cert. den. 353 U.S. 940 ..... 5, 6, 8

Harkins v. *Murphy*, 112 S.W. 136 10

Hood v. *Board of Trustees*, 232 F. 2d 626, cert. den. 352 U.S. 870 6

National Lawyers Guild v. *Brownell*, 255 F. 2d 552 .. 9

Robeson v. *Dulles*, 235 F. 2d 811, cert. den. Nov. 5, 1956 9

Treat v. *Tolman*, 113 F. 892 10

Statutes

N. C. General Statutes, Sections 115-176 et seq. 4

Miscellaneous

Meacham *on Agency* (2d. Ed.) Vol. 1, p. 84, Secs. 124 & 125 10

Restatement of the Law (Agency) p. 54, Sec. 17 10

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JOSEPH HIRAM HOLT, JR., a Minor by His Next Friend, JOSEPH HIRAM HOLT, and JOSEPH HIRAM HOLT and ELWYNA HOLT, *Petitioners,*

— versus —

THE RALEIGH CITY BOARD OF EDUCATION, a Body Corporate, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

No further statement of the facts seems necessary in view of the full and complete findings of the District Judge as set out beginning at page 34, Appendix D, of the Petitioner herein filed. These are authoritative and any attempt to paraphrase or summarize them might result in distortion. We respectfully draw attention to these Findings as the only proper back-

ground of factual information. We call the Court's attention to the following statements in Petitioners' "Statement of the Case" which we believe contrary to the facts before the District and Circuit Courts below:

"Minor petitioner was required to attend a racially segregated school to which only Negro pupils are assigned and permitted to attend while passing a public school to which only white pupils are assigned." (Pet., p. 7). The District Court did not find that they were "required" to attend a racially segregated school, but that minor Petitioner was assigned to a school where only Negro pupils were in attendance during the year 1957-58. The District Court did not find that only Negro pupils were "permitted" to attend, as the record reflects that this was the only change of assignment requested by either a white or Negro child to what was formerly a school attended solely by children of the other race. (Pet. Appdx. "D", p. 45; Finding of Fact #25.)

Also, Petitioners state "Minor Petitioner's application for reassignment was refused because of his race and color." (Pet., p. 7). The District Court did not reach this conclusion (Pet. Appdx. "D", p. 62);

Again, "The Respondent School Board maintains a strict policy of operating its schools upon a racial basis." (Pet., p. 7). There is nothing in the record to support this proposition. The Petitioners in quoting the testimony of a member of the School Board in their Appendix at page 93, line 10 from the bottom of the page, omitted the following sentence which appeared after the word "color." and before the word "On": "I didn't think we should deny on account of

color." (Appellant's Brief in the Circuit Court, p. 89). We also again call the Court's attention to the District Court's Finding of Fact and Opinion (Pet., p. 45 and 62);

The facts which Petitioners allege are conclusively indicated by the Transcript of Evidence (Pet., p. 8 and 9) are not supported by the record but are merely conclusions of Petitioner which were urged both upon the District and Circuit Courts.

ARGUMENT

The Court of Appeals below did not err in affirming the Judgment of the District Court denying relief to Petitioners upon the grounds therein stated to the effect that persons aggrieved by the actions of the School Officials of a state may not appeal for relief to the Federal courts until they have exhausted the remedies afforded them by the statutes of the State.

Reasons suggested by Petitioners for granting certiorari must overcome this basic proposition. It is the *only* question arising from the record in the lower courts.

Petitioners' argument in support of their petition is patently beyond the bounds of reason. Their theory seems to be that, in spite of plain statutory language, no exercise of discretion or other attribute of decision is vested in a Board of Education in North Carolina *after* the moment of original assignment. (Finding of Fact #5, Pet. Appdx. "D", p. 35). And to urge such a thesis upon this Court, Petitioners make up for a paucity of persuasive legal reason with an attack on the courts which have decided against them. While it does not fall to Respondent's lot to adjudge the tem-

perence of Petitioners' presentation, yet it is manifest that the Petition filed is but a prelude to a hoped-for opportunity for more extensive vilification of the judiciary of the Fourth Circuit, in particular, and any Court, in general, which perchance happens to reach different legal and factual conclusions from their own.

Basically, the burden of Petitioners' position is that administrative remedies provided by State Statute have no place in any consideration of a request by a Negro child for admission to a school previously attended by white children. In other words, Petitioners urge that the North Carolina General Statutes, Sections 115-176 et seq. (Pet. Appdx. "G", p. 68-70) are really of no moment under Petitioners' view of *Brown* v. *Board of Education*, 1954, 347 U.S. 483, 74 S. Ct. 686, 98 L. ed. 873; 349 U.S. 294, 75 S. Ct. 743, 99 L. ed. 653. It is suggested, therefore, that in these instances the Federal Courts will require that relief automatically be the result of application and demand begets injunction.

An examination of North Carolina General Statutes, Sections 115-176 et seq. will show the procedural steps in the assignment of pupils in the public schools of North Carolina. Simply put, a county or city Board of Education gives written notice of assignment for the next school year to each individual pupil, white and Negro, at the end of each year. In this case, such assignment accompanied minor petitioner's report card (Finding of Fact #5, Pet. Appdx. "D", p. 35). The Statute goes on to provide that a parent or guardian who is dissatisfied with the assignment thus made may apply in writing for reassignment to a different school and, upon rejection by the Board and notice thereof, may further "apply to the board for a hearing

and shall be entitled to a prompt and fair hearing on the question of reassignment of such child to a different school". The Statute further provides "A majority of the board shall be a quorum for the purpose of *holding such hearing and passing upon application for reassignment*, and the *decision* of a majority of the members present at the hearing shall be the *decision* of the board". (Italics supplied)

If we read the Petition correctly, it seems to ask this Court to reject the holding of the Court of Appeals on the ground that the North Carolina Statute does not mean what it says—that if it is to "determine and decide" a Board must do so prior to assigning a pupil originally and before any application for reassignment is even lodged. Any other view, according to Petitioners is a "graft" of "judicially created power, right and privilege. . . ." upon the statutory provision. Respondent says simply that such argument is not only strained but far beyond comprehension in the light of precedent.

Petitioners' reasoning would lead this Court to ignore the plain language of the North Carolina Statute in many particulars. If Respondent's power of assignment was exhausted at the moment of initial assignment, what then did the Legislature mean by a "hearing on the question of reassignment . . .", by a "decision of a majority of the members present at the hearing . . .", and by the requirement that the Board shall be guided by specified standards in its consideration of an application for reassignment? This is the statutory language which received judicial sanction in *Carson* v. *Warlick*, 238 F. 2d 724, in which case counsel for Petitioners, both in the Court of Appeals and upon Petition for Writ of Certiorari, attempted to

secure nullification of the North Carolina Pupil Assignment Act upon the *same grounds* as are urged in paragraph 1 of Petitioners' argument in this case (Pet., p. 9). Certiorari was denied in the *Carson* case, 353 U.S. 940, as it should be denied here, if for no other reason than a failure on part of Petitioners to demonstrate sufficient reason under United States Supreme Court Rule 19. See also *Hood* v. *Board of Trustees*, 232 F. 2d 626, cert. den. 352 U.S. 870, 77 S. Ct. 95, 1 L. ed. 2d 76.

Petitioner further chooses to ignore the language of *Briggs* v. *Elliott*, 132 F. Supp. 776, to the effect that:

> "Having said this, it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of govern-

mental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of the individuals.

"The Supreme Court has pointed out that the solution to the problem in accord with its decisions is the primary responsibility of school authorities and that the function of the courts is to determine whether action of the school authorities constitutes 'good faith implementation of the governing constitutional principles' . . ."

This language has not been contradicted in other Circuits and has been quoted with approval in most. Further, Petitioners mistakenly interpret the *Brown* decisions as a mandate to desegregate all schools on the basis of proximity of residence rather than as a judicial rejection of any racial discrimination growing out of enforced segregation in public schools. In so doing, they urge as precedent for certiorari here *Aaron* v. *Cooper et al*, 358 U.S. 1, 78 S. Ct. 1401, 3 L. ed. 2d 3. This case grew out of an entirely different kind of situation and is of little value here. No placement act was involved, and it was patently evident that the State in that case would not grant any "right" assured by the *Brown* case, even if properly presented. Petitioners urged the Court of Appeals in this case to regard *Aaron* v. *Cooper*, supra, as controlling, but this notion was rejected for obvious reasons. The case is easily distinguishable, factually and legally.

Petitioners flagrantly take the position that a dissatisfied parent or pupil need not substantiate his application for reassignment in any manner and then Petitioners almost contemptuously flaunt their "dare" in the face of the Federal judiciary. (Pet. pp. 14 and 15). They cry out about "inquisitions" and "legisla-

tive and coercive power" of a "defaulting and delinquent" school board when there is no finding with respect to such by the District Judge. As a matter of fact, this kind of protestation is hardly becoming to Petitioners who bring about a delay in the ultimate decision of their cause by refusing opportunity afforded by the District Court to exhaust their remedies (Pet. Appdx. "D", p. 63). Similarly, their attitude in response to the Board's invitation to appear (Finding of Fact #18, Pet. Appdx., p. 42) and their insistence, through counsel, upon technicalities will hardly commend itself in equity.

In summation of this phase of the case, suffice it to say that the statutory language is plain. Can there be a "hearing" if the result can only be one way? Can there be "decision", if divergent views cannot be weighed? Can a "majority" decide, if a minority has no basis for an opinion? These questions answer themselves, and the answers are given force by the sanction of the judiciary. *Carson* v. *Warlick*, supra.

Respondent feels that something should be said in answer to the argument that the Court of Appeals "gratuitously authorizes and commissions school boards, which have denied to Negro public school pupils the constitutional right of desegregated and non-discriminating education to 'interrogate' and 'investigate' their victims upon the very hearing which the deprived pupils and their parents invoke". (Pet., p. 15). The confusion of this reasoning seems to be matched only by its viciousness. Petitioners say that the original assignment was "purposefully racially discriminatory", whereas in fact the District Court never reached this point and no facts thereupon were found (Pet. Appdx. "D", p. 63). Such a view literally puts "the cart before the horse".

However, Petitioners choose to ignore this in an effort to knock out any statute providing for administrative remedies in this field. By the simple expedient of filing a motion, Petitioners would have been back before the Board of Education where the District Court thought they should have been (Pet. Appdx. "D", p. 63). As said by the District Court:

> "There is no way the Court can anticipate what the action of the Board might have been had the plaintiffs pursued the administrative remedies afforded by law by personally appearing before the Board for a hearing. Pure speculation on my part would serve no useful purpose." (Pet. Appdx. "D", p. 63)

To the same effect is *National Lawyers Guild* v. *Brownell*, 255 F. 2d 552, and *Robeson* v. *Dulles*, 235 F. 2d. 811, cert. den. Nov. 5, 1956.

As said by the Court of Appeals:

> "With these and other pertinent considerations in mind the District Judge might not have felt obliged to dismiss the complaint if he had reached the merits of the case, but *he was restricted* in the scope of his decision *by the failure of the plaintiffs to do their part* in giving effect to the plan of the statute." (Italics supplied) (Pet. Appdx., "C", p. 29).

Some slight treatment should be given to Petitioners' argument that they were deprived of the fundamental right of counsel. It does not appear reasonable to us to say that a power of attorney can satisfy the burden imposed upon a party who asks for a hearing and who is supposed to show a board that he is entitled to the relief sought and for which purpose the hearing is demanded. It seems that the matters here

involved are of the non-delegable type which are treated in:

Treat v. *Tolman,* 113 F. 892
Harkins v. *Murphy,* 112 S.W. 136
Restatement of the Law (*Agency*), p. 54, Sec. 17
Meacham on Agency (2d Ed.) Vol. 1 p. 84, Secs. 124 & 125

Finally, one further word should be said about the argument that the Court should stay the application of the doctrine of exhaustion of administrative remedies where such application is prejudicial to the vested property rights of a litigant. Petitioners say that their "interim rights" will "lapse" without redress. Respondent simply says that their rights need not have "lapsed" if Petitioners had chosen to go back to the Board as suggested by the District Judge (Pet. Appdx. "D" p. 63). Cases cited by Petitioners on pages 18 and 19 of the Petition are clearly distinguishable on a factual basis. Where the result of a hearing is a foregone conclusion, there is little use of having one. However, such is not the case here and there is no finding nor suggestion by the District Court that the "remedy" afforded by the statute would not produce a fair and equitable result based upon evidence therein produced.

A decision contrary to that of the District and Circuit Courts would in effect go far towards nullifying the very principle of "exhaustion of administrative remedies". Rules and regulations established by administrative bodies under statutory authority could be ignored, and, as a consequence, State and Federal courts would be called upon to decide appeals without evidence or findings and opinions of government officials directed to perform these duties. It is the opinion of Respondent that such a decision would be disruptive of the entire administrative procedure which

now is responsible for the conduct of a vast majority of State and Federal matters. To grant the Petitioners' Writ of Certiorari would in effect nullify the statutes of North Carolina and the rules and regulations of the School Board adopted pursuant thereto which have been approved by the Federal Courts in the Fourth and Fifth Circuit Courts without exception. The only decisions in the Federal Courts where pupil assignment laws have been circumvented have been under factual conditions where state constitutional or statutory provisions or local governing authorities have announced a policy of refusing to honor a change of assignment under any circumstances and announced a policy of continued segregation in the face of *Brown* v. *The Board*, supra. This is not the history of the North Carolina Pupil Assignment Act nor the administration of the statute in this State. To grant the Petition for Certiorari would be disruptive of the fair and impartial manner in which the State of North Carolina and this Board have proceeded under the Pupil Assignment Act.

CONCLUSION

The Respondent prays that this Court refuse to issue a Writ of Certiorari to review the Judgment and Decision of the United States Court of Appeals for the Fourth Circuit entered in this cause on March 19, 1959, and that the Petition heretofore filed therefor be denied.

Respectfully submitted,

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